89- 1464

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tennessee Valley Authority Violate Petitioner George Noble's veterans preference status when it hired a nonpreference eligible with a lower retention status than Petitioner Noble in October of 1985?

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The opinion of the United States Court of Appeals for the Federal Circuit, En Banc (App. A-1a through 14a) will be reported _____. The opinion of the United States of America Merits Systems Protection Board (App. D-27a, infra, pp. D-27a through 36a) is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit sitting En Banc was entered on December 19, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statutes involved in this appeal are set forth in Appendix E, infra, pp. E-37a through 39a.

STATEMENT

1. Background.

This action is the result of Tennessee Valley Authority's failure to adhere to the principles and requirements established by the Veterans Preference Act of 1944. The Tennessee Valley Authority ("TVA") violated Petitioner Noble's veterans preference status when it hired a non-preference eligible cement mason on October 8, 1985 in the place and stead of Petitioner Noble.

George Noble is a sixty-four (64) year old back male who is a cement mason by trade. Mr. Noble was employed by TVA at the Bellefonte Nuclear Plant from on or about July 1, 1972 until July 31, 1985. (App. p. 87a). On or about July 2, 1985 the completion date for the Bellefonte Nuclear Plant was extended. (App. pp. 27a-28a). As a result of this extension, only forty percent (40%) of the then current work force was needed. (App. p. 28a). TVA then made the decision to cut the trades and labor work force by sixty percent (60%). (App. p. 28a). The final figures establish that the trades and labor work force was actually cut by sixty-five percent (65%). (App. p. 29a). Within the individual crafts, the reductions ranged from forty-three (43%) of operating engineers to eighty-nine (89%) of the asbestos workers. The cement workers were cut by eighty-one percent (81%). (App. p. 29a).

Based on the extension, nineteen (19) of the twenty-one (21) cement masons in Mr. Noble's competative level were separated as a result of the RIF and Mr. Noble had greatest retention standing of those who were separated. (App. p. 29a).

In fact, the labor superintendent, Mr. Jimmy Henard, made the decision to retain only four (4) cement masons for the entire Bellefonte Plant. (App. p. 29a).

Subsequent to Petitioner Noble's RIF, Jimmy M. Henard, Labor Superintendent for TVA, determined that two (2) additional cement masons would be needed to perform the work required by that trade. (App. p. 30a).

TVA generally uses a "call-by-name" procedure to fill trades and labor hourly positions with outside candidates. (App. p. 52a). Managers may request by name, certain candidates based on their qualifications to do their work. (App. p. 52a). The employment office then generally calls the appropriate union and requests individuals by name for referral from the union. (App. p. 52a). When such trade and labor hourly positions are filled by outside candidates, preference eligibles, who are:

1. available;

2. complied with the applicable procedures in asserting their preference;

3. live in the commuting area of the job;

are considered before similarly qualified non-preference eligibles, even if the non-preference eligibles were called-by-name. (App. p. 52a).

On or about October 7, 1985 Petitioner Noble complied with the applicable procedures in asserting his veterans preference. (App. pp. 87a-88a). On October 8, 1985 TVA hired James Kincherlow, a cement mason, who was called-by-name by TVA and Mr. Henard but who was a non-preference eligible. (App. pp. 91a-92a).

Since the RIF action taken by TVA on July 31, 1985 Petitioner Noble has been laid off and without work.

EXISTENCE OF JURISIDICTION BELOW

Petitioner George Noble initially filed a discrimination complaint with the TVA alleging the agency had discriminated against him in separating him from his employment with TVA by application of the RIF, effective August 30, 1985. (App. p. 27a-28a). TVA's final decision on the discrimination complaint was issued on February 10, 1988. (App. p. 28a, footnote). By Petition filed March 2, 1988 Petitioner Noble appealed to the Merit Systems Protection Board. (App. p. 27a). In addition to the discrimination complaint Petitioner Noble alleged that TVA had violated his veterans preference status when it hired a non-preference eligible on October 8, 1985. The Merit Systems Protection Board's final decision on the complaint was issued on June 24, 1988. (App. p. 27a). By Notice of Appeal filed on or about August 26, 1988 Petitioner Noble appealed the Merit Systems Protection Board's ruling to the United States Court of Appeals for the Federal Circuit. The United States Court of Appeals for the Federal Court issued an initial opinion on June 6, 1989 remanding this action for further proceedings before the Merit Systems Protection Board consistent with the findings in the opinion. (App. p. 15a-23a). On or about the 19 day of June, 1989, the Tennessee Valley Authority filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The United States Court of Appeals for the Federal Circuit heard the case En Banc and issued its final opinion on December 20, 1989 and dismissed Petitioner Noble's appeal.

The United States of America Merit Systems Protection Board had jurisdiction to hear the appeal of George Noble pursuant to 5 U.S.C. § 7701(a); 5 C.F.R. § 351.901 and § 351.202(a)(1). The United States Court of Appeals for the Federal Circuit had jurisdiction to hear Petitioner Noble's appeal pursuant to 5 U.S.C. § 7703 (1988).

A. REASONS FOR GRANTING THE WRIT

In this case, the United States Court of Appeals for the Federal Circuit, in a sharply divided opinion, has announced a far reaching rule which would prohibit this veteran as well as others from establishing a violation of his veterans preference status before the Merit Systems Appeal Board and from further review by the United States Court of Appeals for the Federal Court. This ruling is contrary to the language and history of the Veterans Preference Act of 1944 which codifies, strengthens and bonds the various standards of pro veteran legislation that have been woven into the fabric of the civil service system since the early days of our republic and declares in the most sweeping terms that preference shall be given to veterans in all establishments, agencies, bureaus, administrations, projects and departments of the government. This ruling is also inconsistent with the case law which supports veterans' rights. If this ruling is permitted to stand it will effectively eliminate a veteran's right to enforce his veterans preference rights accorded him by the Veterans Preference Act. As noted by the Court below:

> "the concern of the citizens of the United States for veterans preference, guaranteed by law in both private and public employment, has been a solid cornerstone of Amer-

> ican public policy. This was uncontested until now . . . *Noble v. Tennessee Valley Authority*, 88-3436 Dissent p. 2.

The order raises some embarrassing questions:

> Did Congress not mean what it said about re-employment preference right because, as the order holds, the Congress did not provide a means to enforce them before the MSPB? *Id* at p. 7.

> It is provided by statute and regulation, as we have shown, that those who are fired for unsatisfactory performance can get a hearing before the MSPB, as can those fired for the efficiency of the service because of misconduct. It is reasonable then to hold that the law bars a hearing to a faithful, competent employee who is holder of a veterans preference and who seeks to assert his re-employment rights a head of a non-veteran? *Id* at p. 7.

> Has congress now provided that the incompetent and dishonest are to be accorded MSPB hearings while heros who have preserved our liberties are barred? *Id* at p. 7.

> Is the foregoing according to considered congressional intent and legislative history? *Id* at p. 7.

The order from which Petitioner Noble appeals definitely answers these questions in the affirmative. As noted in the dissent:

> "The result is hypertechnical, whimsical, bizarre and misreads the mind of the president,

> and the minds of the 532 members of congress in 1978 when the CSRA became law." *Id* at p. 7.

It is not disputed that Petitioner Noble is a veteran, having served in the United States Air Force for a period of three (3) years from 1944-1947. (App. p. 93a).

Pursuant to § 2108(1)(A) a preference eligible means a veteran as defined by § 2108(1)(A). A preference eligible entitled to rights under the Veterans Preference Act of 1944 must have permanent or indefinite appointment of tenure in civil service and must also have completed a probationary or trial period. *Mahon v. Young*, 177 F. Supp. 75 (D.C. Dist. of Col. 1957). Petitioner Noble without question is a veteran and a preference eligible who was and is entitled to veterans preference status accorded by the Veterans Preference Act. In order to comply with the Veterans Preference Act, TVA has adopted policies and procedures insuring the protection of veterans' rights in retention, hiring or rehiring. TVA has promulgated these rules and guidelines in order to insure that a veteran is accorded all rights pursuant to the Veterans Preference Act. Although the facts in this case are simple and not complex, the issues in controversy are of paramount importance as they relate to the enforceability of veterans' preference rights. In this case TVA violated Petitioner Noble's preference rights when it failed to adhere to the specific guidelines and procedures adopted to insure compliance with the Veterans Preference Act. TVA failed to call Petitioner Noble although Petitioner Noble was a qualified veteran, had exercised his veterans preference and was available in the commuting area. Instead of hiring

Mr. Noble, TVA hired James Kincherlow, a non-preference eligible. Under the stated, and undisputed facts there is no question but that Mr. Noble's veterans preference rights were violated. In addition, the procedures utilized by TVA to ensure that veterans are given preference were not followed. Accordingly, Petitioner Noble contends that when a veteran is denied his preference and/or when an agency fails to adhere to its own procedures and guidelines that insure a veterans preference will be honored, then, in that event, the veteran should have a right to enforce his veterans preference status and should be able or entitled to have his claim heard by the Merit Systems Protection Board in order to insure the intent and the spirit of the Veterans Preference Act of 1944 will be enforced.

B. THE ISSUE IN THIS CASE HAS NOT BEEN DECIDED BY COURT NOR HAS THIS COURT OTHERWISE SPOKEN PLAINLY ON THE ISSUE.

This is a case of first impression and there are no other cases like or similar to the case at bar. In the past, the Supreme Court has ruled that the Veterans Preference Act shall be liberally construed in the favor of the veteran. *Brannon v. Elder*, 341 U.S. 321 (1951); *United States v. Fausto*, 484 U.S. 439 (1988). In addition, the legislative history which preceded the enactment of the Veterans Preference Act of 1944 demonstrate that Congress intended for the Veterans Preference Act to fully guarantee a veteran preference in hiring, retention and rehiring.

> "Congress intended that the MSPB shall have powers essentially exclusive in nature for administrative adjudication of personnel disputes in the government when an agency's

> action is tested by an employee who believes he has been deprived of his rights under law." *Noble v. Tennessee Valley Authority*, 88-3436 (1989) dissent at p. 3.

This case goes to the very heart of the Veterans Preference Act and the United States Court of Appeals for the Federal Circuit has significantly affected the rights of veterans with its decision to prevent veterans denied their preference rights access to the MSPB for enforcement of those rights specified in the Veterans Preference Act and guaranteed through procedures and guidelines which were promulgated in an attempt to insure that veterans are indeed given preference in retention, re-employment and rehiring.

CONCLUSION

This Court should review this case because the undermining of the Veterans Preference Act and the potential for conflict in future cases dealing with the same subject matter, which the decision below makes possible, is a matter of substantial public importance and concern. For these reasons, it is respectfully requested that the United States Supreme Court grant the Petitioner's Writ of Certiorari.

March 19, 1990

Respectfully Submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

Filed 12/19/89

Before MARKEY, *Chief Judge*, RICH, *Circuit Judge*, BENNETT and FRIEDMAN,* *Senior Circuit Judges*, NIES, NEWMAN, BISSELL, ARCHER, MAYER and MICHEL, *Circuit Judges*.

ARCHER, *Circuit Judge*, filed an Order in which MARKEY, *Chief Judge*, RICH, NIES, BISSELL, MAYER and MICHEL, *Circuit Judges*, join; BENNETT, *Senior Circuit Judge*, filed a dissent in which FRIEDMAN, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*, joined.

ARCHER, *Circuit Judge*.

ORDER

This petition for review arises from the decision of the Merit Systems Protection Board (MSPB or Board), Docket No. AT03518810283 (June 24, 1988), sustaining the separation of George Noble by reduction-in-force (RIF) from the Tennessee Valley Authority (TVA).

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* Judge Friedman took senior status on November 1, 1989.

A. Noble, a "preference eligible" as defined by 5 U.S.C. § 2108 (1988), was employed by the TVA at its Bellefonte Nuclear Plant in Hollywood, Alabama, until August 30, 1985, when he and eighteen other cement masons in his competitive level were separated by RIF. Noble challenged his separation by filing an Equal Employment Opportunity (EEO) complaint within the TVA alleging that he had been discriminated against on the basis of both age and race. Following the agency's denial of his EEO complaint on February 10, 1988, Noble appealed to the MSPB on the grounds set forth in his EEO complaint and, as well, alleging that the TVA had illegally failed to recognize and honor his reemployment rights under the Veterans' Preference Act of 1944 (VPA) (codified at 5 U.S.C. §§ 1302, 2108, 3305, 3308-3318, 3320, 3351, 3363, 3501-3504, 7511-7513, and 7701 (1988)). Noble's claim to reemployment rights relates to the failure of TVA to rehire him in October 1985.

The Board characterized Noble's appeal as a challenge to the *bona fides* of the agency's RIF action and, after finding the agency's procedures to be in accordance with law, denied Noble's appeal. Although Noble specifically raised the issue, the Board did not consider his claim that the TVA had violated his reemployment rights under 5 U.S.C. § 3315 (1988).

In this court, Noble has abandoned his discrimination claims, instead basing his petition solely on the failure of the MSPB to require the TVA to honor his reemployment rights under the VPA. Accordingly, this is no longer a "mixed" case and jurisdiction over this matter lies, if at all, in this court. *See* 5 U.S.C. § 7703(b)(1) (1988); 28 U.S.C. § 1295(a)(9) (1982); *cf.* 5 U.S.C. § 7703(b)(2) (1988); *Williams v. Department of Army*, 715 F.2d 1485 (Fed. Cir. 1983) (*in banc*) (Federal Circuit has no jurisdiction to review MSPB decisions involving discrimination claims).

B. Our appellate jurisdiction is governed by 28 U.S.C. § 1295 (1982) which states, in part, that this court has "exclusive jurisdiction . . . of an appeal from a final order or final decision of the [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5[.]" 28 U.S.C. § 1295(a)(9). Implicit in this grant of authority, however, is the limitation that we may review the Board's decisions regarding only those matters over which the Board itself has subject matter jurisdiction. *Maddox v. Merit Sys. Protection Bd.*, 759 F.2d 9, 10 (Fed. Cir. 1985); *see also* P. Broida, *A Guide to Merit System Protection Board Law & Practice* 1487 (1989) ("It is significant in determining whether the Federal Circuit has jurisdiction in an appeal to first determine whether the Board properly has jurisdiction. . . ."). Therefore, unless the MSPB was authorized to consider Noble's claim that the TVA violated his VPA reemployment rights, we are without power to entertain his petition for review on that issue.

As we have often stated, the MSPB has no jurisdiction except that granted to it by "law, rule, or regulation." 5 U.S.C. § 7701(a) (1988); *see, e.g., Manning v. Merit Sys. Protection Bd.*, 742 F.2d 1424, 1426 (Fed. Cir. 1984); *Thomas v. United States*, 709 F.2d 48, 49 (Fed. Cir. 1983); *cf. Lackhouse v. Merit Sys. Protection Bd.*, 773 F.2d 303, 315-16 (Fed. Cir. 1985). A general listing of the Board's subject matter jurisdiction is set forth in 5 C.F.R. § 1201.3(a) (1989).

In this case, Noble has cited no "law, rule, or regulation" authorizing an appeal to the MSPB by a preference eligible seeking reemployment by the TVA based on an alleged violation of his priority rights under the VPA, and none exists. While the TVA is required by statute to honor the reemployment priority rights of preference eligibles pursuant to the VPA, *see* 5 U.S.C. §§ 3315, 3316 and 3320 (1988), neither the VPA nor the regulations promulgated pursuant to the VPA, *see* 5 U.S.C. § 1302 (1988), contain any provision granting Noble and others similarly situated

the right to appeal an alleged violation of these rights to the MSPB.

An appeal to the MSPB by a preference eligible against whom an "adverse action" has been taken under 5 U.S.C. §§ 7511-7513 (1988) is authorized by section 7513(d). These "adverse actions," however, do not include a failure to rehire following separation by RIF. Likewise, the appeal right set forth in 5 C.F.R. § 330.209, which provides that "[a]n individual who believes that his or her reemployment priority rights under this subpart have been violated . . . may appeal to the [MSPB]," does not apply to one in Noble's situation. Subpart 330 covers only those individuals seeking reemployment within the "competitive" service, 5 C.F.R. § 330.203, from which the TVA is excepted. *See Dodd v. TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985),[1] (positions within the TVA are within the "excepted," not the "competitive," service). The reemployment and appeal rights set forth in subparts 302, 352, and 353 of 5 C.F.R. similarly do not apply to persons in Noble's status. The provisions of these subparts are tailored to specific factual situations, none of which involves reemployment following separation by RIF from the TVA.

Accordingly, because there is no "law, rule, or regulation" authorizing the Board to adjudicate Noble's alleged violation of his VPA reemployment rights, the Board was without subject matter jurisdiction to consider that portion of his appeal. Because the Board lacked jurisdiction over Noble's VPA reemployment rights, which is the only issue

---

[1] In *Dodd* we held that a preference eligible could appeal to the MSPB on the basis of an alleged violation by the TVA of his *retention* priority rights as provided by 5 C.F.R. § 351.901 (1988). Retention rights, however, are separate and distinct from the reemployment rights Noble seeks to assert in this case. *See Elder v. Brannan*, 341 U.S. 277, 286-89 (1951). Therefore, section 351.901 does not provide an avenue by which Noble may appeal to the MSPB based on an alleged violation of his VPA reemployment rights.

before this court (all other matters raised before the MSPB being abandoned), we, as well, are without jurisdiction over Noble's petition for review. If Congress or the Office of Personnel Management had determined that preference eligibles of Noble's status should be allowed to seek redress of violations of their reemployment rights by appealing to the MSPB, they could have so provided. Neither has done so at this time and we are without authority to prescribe such a procedure.

Accordingly, IT IS ORDERED that the appeal be dismissed.

FOR THE COURT

12/19/89
Date

/s/ Glenn L. Archer, Jr.
Glenn L. Archer, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

BENNETT, *Senior Circuit Judge*, dissenting, with whom FRIEDMAN, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*, join.

I respectfully dissent from the order. As background, petitioner Noble, an employee in the excepted civil service of the United States, 5 U.S.C. § 2103 (1988), with the Tennessee Valley Authority, was separated from his position by a reduction in force no longer contested. He later asserted, but was denied, his right to be rehired pursuant to his entitlements under miscellaneous provisions of the Veterans' Preference Act of 1944 (VPA), as amended, and the Civil Service Reform Act of 1978 (CSRA). *See* 5 U.S.C. §§ 1302, 3315-3316, 3501 (1988). Hence this appeal. It is uncontested that Noble is a veteran as defined by law, 5 U.S.C. § 2108 (1988), and as such was a preference eligible employee of the government. The fact that he occupied an excepted position is irrelevant to his entitlement as a veteran to preference in hiring, retention, or rehiring over nonpreference employees. *Cf. Dodd v. TVA*, 770 F.2d 1038, 1041 nn.6 & 7 (Fed. Cir. 1985).

The sweep of veteran's preference law in our society for reemployment of a qualifying veteran is very broad. 38 U.S.C. §§ 2021-2026 (1988). Enforcement of reemploy-

ment rights where the employer is a private employer, a state or one of its political subdivisions, can be had by resorting to the authority of a United States district court. 38 U.S.C. § 2022. However, since Noble, a federal government employee, had the status of a preference eligible by reason of military service, he was required to turn to the Merit Systems Protection Board (MSPB) for enforcement of his statutory right to be rehired ahead of those without such statutory preference. In his appeal to the MSPB, petitioner raised the reemployment preference issue four times but the MSPB did not address it. The appeal was disposed of on grounds mentioned in the order, which are no longer in issue. In *Noble v. TVA*, 876 F.2d 1580 (Fed. Cir. 1989), we simply remanded for findings by the MSPB on the merits of the reemployment claim which the Board had not decided.

The order now at issue would prohibit this veteran from establishing his claim on the merits before the MSPB and, implicitly, from review by this court. It does so by contending that Noble could point to no "law, rule, or regulation" which authorizes him to appeal to the MSPB. 5 U.S.C. § 7701(a) (1988). It is submitted here that this is not so. The authorization for Mr. Noble's appeal to the MSPB is the Veterans' Preference Act itself, which gives Mr. Noble his reemployment rights, together with the Civil Service Reform Act, which, as construed by the Supreme Court, establishes the MSPB as the exclusive forum in which those rights can be enforced.

I.

The statutes and regulations demonstrate Congress intended that the MSPB shall have powers essentially exclusive in nature for administrative adjudication of personnel disputes in the government when an agency's action is tested by an employee who believes he has been deprived of his rights under law. 5 U.S.C. § 1205 (1988). *See United States v. Fausto*, 484 U.S. 439, 449 (1988). It

was therefore provided that an employee may submit to the Board an appeal on any action appealable to the Board. 5 U.S.C. § 7701. The MSPB is charged with correcting on appeal any harmful administrative error. 5 U.S.C. § 7701(c)(2). The term employee is defined as including a preference eligible in the excepted service. 5 U.S.C. § 7511(a)(1)(B). It is provided further that the MSPB has jurisdiction to consider an appeal which in the competitive service challenges "[e]mployment of another applicant when an appellant is entitled to priority employment consideration after a RIF." 5 C.F.R. § 1201.3(a)(13) (1989). Under the regulations, "Reduction in Force, Subpart I, Appeals and Corrective Action," 5 C.F.R. § 351.901 (1989), it is also stated: "An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal to the Merit Systems Protection Board."

Preference eligible employees who are separated or reduced in grade for unacceptable performance are entitled to an appeal to the MSPB. 5 U.S.C. § 4303 (1988). Those who suffer work injuries are entitled to priority consideration and appeal. 5 U.S.C. § 8101 (1988); 5 C.F.R. § 302.501 (1989). Preference employees discharged for efficiency of the service because of misconduct are entitled to appeal to the MSPB. 5 U.S.C. § 7513 (1988); 5 C.F.R. § 752.405 (1989). Even an employee without veteran's preference who is denied reemployment by his agency after service with the Panama Canal Commission can appeal to the MSPB. 5 C.F.R. § 352.909 (1989). The same is true of excepted employees under the Foreign Assistance Act of 1961, 5 C.F.R. §§ 352.502, 352.508 (1989), as well as certain Indian employees, 5 C.F.R. § 352.707 (1989). All of the above goes to demonstrate the across-the-board span of appeal rights, especially for preference eligibles.

In more general terms, it is provided that: "*Any employee* or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems

Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1) (1988) (emphasis added). Also, it is provided: "An individual who believes that his or her *reemployment* priority rights under this subpart have been violated because of the employment of another person who otherwise could not have been appointed properly may appeal to the Merit Systems Protection Board under the provisions of the Board's regulations." 5 C.F.R. § 330.209 (1989) (emphasis added). *See also* 5 C.F.R. § 302.101 (1989); 5 C.F.R. § 352.209 (1989). The right of reemployment enforced by appeal is a recognized right of government employees, especially for preference eligibles in either the competitive or excepted service. *See, e.g.*, 5 C.F.R. § 352.204(a)(1) and (3) (1989), as illustrated by interagency transfers and separations for misconduct or unacceptable performance, shown above.

This court may take notice of an official document received from the Chairman of the MSPB under date of August 17, 1989, a 57-page published report, entitled "The Tennessee Valley Authority and the Merit Principles, A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board." This report states it was prepared pursuant to direction of the Civil Service Reform Act of 1978 which requires that the MSPB make special studies of "the civil service and other merit systems" to determine if they are operating in accord with the merit principles in the Act and are free of prohibited personnel practices. In this context, TVA falls within the definition of "other merit systems." The report thus evaluates the personnel program of the TVA and compares it to civil service which it parallels in many respects, but differs in some.

The MSPB report on the TVA shows in several places that TVA fully recognizes the necessary deference to the mandates of the Veterans' Preference Act of 1944 and states: "*All* TVA employees have the right to appeal RIF actions to MSPB, as do civil service employees." (Empha-

sis added.) Preference eligibles have additional appeal rights such as in adverse actions and job restoration. Report at 40. Mr. Noble's separation or job loss by RIF gave rise to his present restoration claim based on the VPA.

In *Noble* we agreed with the thrust of the subsequent MSPB report that the VPA applied to TVA and held that all employees in government are subject to the rights of preference eligibles. *See* 5 U.S.C. § 1302 (1988); 5 C.F.R. § 1201.3(a)(13). The order concedes this. We held that it was error by MSPB not to consider Noble's claim on the merits under the VPA, the applicable statutes, and regulations. We simply remanded with direction that it do so. This is not expanding preference rights of TVA employees who are veterans, rights they already had by various statutes and judicial precedent cited. If this is not so and if veterans have no recourse to protect their preference, MSPB will have to rewrite its report on the TVA, which it has published and sent to the President, Congress, and the court saying that the VPA does apply to TVA employees who qualify for veteran status, and that TVA employees have appeal rights.

The challenged order's pronouncement will come as a great shock to our military veterans. For generations veterans have relied on their preference eligibility for government employment, retention, and rehiring, which has been sanctified by one Congress after another. Under the CSRA, enforcement of those rights can only be had by the MSPB. The concern of the citizens of the United States for veteran's preference, guaranteed by law in both private and public employment, has been a solid cornerstone of American public policy. This was uncontested until now. The order cites 23 veteran's preference statutes, but there are others. The order raises some embarrassing questions:

> Did Congress not mean what it said about reemployment preference rights because, as the order

holds, the Congress did not provide a means to enforce them before the MSPB?

It is provided by statute and regulation, as we have shown, that those who are fired for unsatisfactory performance can get a hearing before the MSPB, as can those fired for the efficiency of the service because of misconduct. Is it reasonable then to hold that the law bars a hearing to a faithful, competent employee who is holder of a veteran's preference and who seeks to assert his reemployment rights ahead of a nonveteran?

Has Congress now provided that the incompetent and dishonest are to be accorded MSPB hearings while heroes who have preserved our liberties are barred?

Is the foregoing according to considered congressional intent and legislative history?

The order definitely answers these questions in the affirmative. It does not even admit the result is unfortunate. Indeed the result is hypertechnical, whimsical, bizarre and misreads the mind of the President, and the minds of 531 Members of Congress in 1978 when the CSRA became law.

II.

The Supreme Court had occasion to address veteran's preference in *Hilton v. Sullivan*, 334 U.S. 323 (1948). There the issue was whether a statute gave veterans job retention preference over nonveterans. The Court held that as to government employment the retention preference for veterans was "absolute." It observed that this preference had been the law at least since 1876 and had specifically included the civil service by statute, regulation, and Executive orders. This remains true today but the preference has been extended to reemployment as well by the statutes and regulations cited above.

More recently, in *Fausto*, 484 U.S. 439, the Court considered the case of a nonpreference member of the excepted service. He had been discharged for misuse of a government automobile, among other reasons. He appealed to the MSPB which held it had no jurisdiction under the CSRA to entertain an appeal from an employee in his nonpreference status. Next, the Claims Court denied relief under the Back Pay Act, 5 U.S.C. § 5596 (1988), and the Tucker Act, as amended, 28 U.S.C. § 1491 (1988), holding the CSRA was exclusively applicable and did not provide a nonpreference employee in the excepted service with an appeal to the MSPB. The Federal Circuit reversed, upholding Claims Court jurisdiction under the Back Pay Act.

In reversing the Federal Circuit in *Fausto*, the Supreme Court noted that the purpose of Congress in enacting the CSRA was to replace the prior haphazard system with an integrated one for administrative and judicial review of personnel actions prejudicial to government employees. The Act's comprehensive nature was persuasive to the Supreme Court that there was no congressional intent to grant appeal rights to nonpreference individuals in the excepted service. On the other hand, the Court was careful to point out statutory and regulatory rights preference eligibles in excepted service have to appeal to the MSPB under chapters 43 and 75 of the CSRA. Certain new procedural protections were provided by the CSRA to nonpreference excepted service workers, but appeal was not among them. The Supreme Court recognized that veteran's preference has been a traditional feature, even for excepted service employees, and this was continued by the CSRA. *See Fausto*, 484 U.S. at 449.

In short, the Supreme Court looked at the structure of the CSRA, the ills it sought to cure, the historical treatment of preference and nonpreference eligibles in excepted service, reconciled the statutes, and concluded there was MSPB review for those holding veteran's preference in excepted service but not for others. It is noted that the

Office of Personnel Management was given authority to extend MSPB and judicial review to certain of these less favored employees but has not done so. *Fausto*, 484 U.S. at 448.

The same analysis can be applied to reconcile provisions for the conceded rights Noble has to reemployment in his agency over those with lesser rights. Enforcement of those rights is in issue. This analysis leads to the inescapable conclusion that Congress thought it had provided for enforcement of rehiring or reinstatement rights, as indeed it did. The *Fausto* analysis reaches this conclusion for Mr. Noble because, unlike with Mr. Fausto, Noble's claim before the MSPB is undergirded by history favoring veteran's preference and the consent of the nation expressed by the will of Congress. Noble has this advantage over Fausto who really could point to nothing to support his claim of implicit congressional intent to allow his appeal. By contrast, in the present case there is no implicit or overt manifestation of congressional opposition to review. Since Congress historically has favored veteran's preference, including reemployment rights, how can it be implied they are now left unenforceable? To so hold is to say that in providing for preference eligibility Congress has done a useless act, a proposition disfavored in the law. *South Corp. v. United States*, 690 F. 2d 1368, 1374 (in banc), 1 Fed. Cir. (T) 1, 215 USPQ 657 (1982).

Justice will best be done by letting Mr. Noble have his day before the MSPB to prove his case if he can, rather than to leave him with no remedy. He disputes key facts left unaddressed. The TVA will also be able to assert other defenses such as the alleged untimeliness of the administrative appeal. Congress is presumed to have intended judicial review of agency actions unless there is persuasive reason to believe otherwise. In *Fausto* there was such a reason. There is none here. The intent of Congress is fairly discernible. Especially is this so when one considers the intent of the statutory scheme of the Civil Service Reform

Act as a whole. *See Fausto*, 484 U.S. at 452. Further, the long history of enforceable veteran's preference under law, as well as the explicit language of the statutes and regulations cited above, deprives the order of viability.

For all of the foregoing reasons, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: JUN-6 1989

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs from and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of the costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

NOBLE V TVA, 88-3436
(MSPB - AT03518810283)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

Jay E. Emerson, Jr., Higgs & Conchin, of Huntsville, Alabama, argued for petitioner.

Ronald E. Klipach, Tennessee Valley Authority, of Knoxville, Tennessee, argued for respondent. With him on the brief were *Edward S. Christenbury*, General Counsel, *Justin M. Schwamm, Sr.*, Assistant General Counsel and *Harriet A. Cooper*, Senior Litigation Attorney.

Appealed from: Merit System Protection Board

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

DECIDED: June 6, 1989

Before FRIEDMAN and RICH, *Circuit Judges*, and BENNETT, *Senior Circuit Judge.*

BENNETT, *Senior Circuit Judge.*

Petitioner Noble appeals the final decision of the Merit System Protection Board (MSPB), No. AT03518810283, June 24, 1988, which sustained the action of the Tennessee Valley Authority (TVA) in separating petitioner by a reduction in force (RIF) in 1985 and in rejecting his claims of discrimination. We remand on other grounds.

OPINION

In the present appeal, petitioner abandons challenges he made to the MSPB about the RIF and discrimination. Instead, he asserts that the MSPB erred when it did not require the TVA to rehire him on the basis of his rights under the Veterans Preference Act (VPA) of 1944, as amended. This matter was not addressed in the MSPB opinion, although it was one basis for his appeal to the MSPB, so stated four times therein. It is uncontested that

Noble is a veteran as defined by law. 5 U.S.C. § 2108 (1982), and entitled to veteran's preference. 5 U.S.C. §§ 3501-3502 (1982).

We have held heretofore that positions with the TVA are excepted ones generally not subject to civil service laws as they pertain to the competitive service. *Dodd v. TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985).* However, we also held that the fact an employee of TVA is in an excepted position does not diminish his veteran's retention preference rights over nonpreference employees. *Id.* at 1041 n.6. Whether these rights were violated here was not the subject of findings by the MSPB.

The TVA casts this case as one where the issue, as pertains to veteran's preference, is not *retention* over employees who were not veterans but were nevertheless retained over Mr. Noble. Rather, it says that the issue is whether having been laid off in a RIF petitioner had any rights to be *rehired* over the RIF'd nonpreference employees. Upon this thesis, TVA concludes that the VPA does not apply and that neither the MSPB nor the court has jurisdiction over rehiring claims. It is well settled that one cannot claim back pay or restoration to a position from which he was legally separated or to which he was never appointed in the first place, unless some statute provides otherwise. Rejection by the administrative judge

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* The Tennessee Valley Authority did not challenge MSPB jurisdiction in *Dodd v. TVA*, 770 F.2d 1038 (Fed. Cir. 1985), as it does here. Petitioner there lost his position by a reduction in force and invoked retention preference as a veteran under 5 U.S.C. § 3502(c) (1982). It was held that he occupied a single-person competitive level where there were no employees against whom he could compete for retention and that the section did not apply to him. Further, it was held that while the Office of Personnel Management had adopted a regulation treating some competitive and excepted employees differently, the regulation did not violate the Veterans Preference Act in the context of the Dodd claim. This is not an issue raised by the parties in the present case which has different facts.

at a prehearing conference of any jurisdiction over the veteran's preference rehiring claim was, however, without any explanation.

The TVA in its brief and argument, concedes that in 1945 the Civil Service Commission, predecessor to the Office of Personnel Management, agreed with TVA that requirements of the VPA would be met within TVA which would, however, maintain its own personnel system separate from civil service. Accordingly, petitioner relies on the first two statutes quoted below. Title 5 U.S.C. § 3315 (1982) provides in part:

> (a) A preference eligible who has been separated or furloughed without delinquency or misconduct, on request, is entitled to have his name placed on appropriate registers and employment lists for every position for which his qualifications have been established, *in the order named by section 3313 of this title. This subsection applies to registers and employment lists maintained by the Office of Personnel Management, and Executive agency, or the government of the District of Columbia.* [Emphasis added.]

Title 5 U.S.C. § 3316 provides:

> On request of an appointing authority, a preference eligible who has resigned or who has been dismissed or furloughed may be certified for, and appointed to, a position for which he is eligible *in the competitive service, an Executive agency, or the government of the District of Columbia.* [Emphasis added.]

Title 5 U.S.C. § 3313, referenced in section 3315, above, but not a section cited by petitioner, reads:

> The names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles in the following order—

(1) for scientific and professional positions in GS-9 or higher, in the order of their ratings, including points added under section 3309 of this title; and

(2) for all other positions—

(A) disabled veterans who have a compensable service-connected disability of 10 percent or more, in order of their ratings, including points added under section 3309 of this title; and

(B) remaining applicants, in the order of their ratings, including points added under section 3309 of this title.

The emphasized portions of sections 3315 and 3316 are not included in petitioner's brief.

It appears from the foregoing that petitioner Noble, a cement mason who is not alleged to have been in the competitive service, or to have been on a competitive register for such employees, or to have taken any examination for his employment, cannot, without more, draw much comfort from the foregoing statutes. Yet, it is equally clear that the fact Noble held an excepted position has no effect whatever on his retention preference rights which apply to *each employee* of an Executive agency and which by definition include an Executive department, government corporation, and independent establishment, i.e., the TVA. 5 U.S.C. §§ 105, 3501(b) (1982). It cannot be disputed, and is not disputed, that the historic legislative policy in this nation has been to favor military veterans over nonveterans in employment by the federal government. Since the earliest days to the present this preference has constantly been expanded by law and in our considered judgment pertains both to preference in retention and to rehiring and to competitive and excepted positions. *See Dodd*, 770 F.2d at 1041 n.7; *cf. United States v. Fausto*, 108 S. Ct. 668, 672-73 (1988) (preference eligible employees can appeal to MSPB and the Federal Circuit under the Civil Service

Reform Act of 1978). *Hilton v. Sullivan*, 334 U.S. 323, 339 (1948) (veteran preference is absolute). Viewing the statutes as a whole and with historic perspective, the distinction between the foregoing terms becomes artificial, untenable, and contrary to congressional intent as to veterans.

The TVA and Noble agree that the court must consider whether petitioner's claim that TVA's failure to rehire him for an excepted service position violated his rights under the Veterans Preference Act of 1944. TVA, however, goes two steps further. First, it has challenged the jurisdiction of the MSPB and hence of this court to consider the rehiring claim. Second, assuming that we decide there was jurisdiction in the MSPB, it is urged the court should not remand but should affirm the MSPB decision. This is because TVA asserts that the "undisputed record" shows petitioner has not demonstrated his preference rights were violated. As we have noted, the MSPB's opinion did not discuss the VPA or the merits of Noble's claim thereunder.

On the issue of MSPB jurisdiction, TVA correctly states that the relevant regulation defining the categories of cases and issues that fall within the MSPB's appellate jurisdiction is 5 C.F.R. § 1201.3 (1988), which reads in pertinent part:

> (a) *Appellate jurisdiction generally.* The Board has jurisdiction over appeals from agency actions when the appeal is authorized by law, rule, or regulation. This appellate jurisdiction includes:
>
> . . . .
>
> (13) Employment of another applicant when an appellant is entitled to priority employment consideration after reduction in force or partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.202[.]

We note that section 302.501 which deals with the personal injury situations is not relevant here. Section 330.202 is with reference to reemployment priority list appeals only within the competitive service. TVA concludes that none of the foregoing provides the MSPB with jurisdiction of the present claim for preference to a position in the excepted service. The TVA does not attempt to reconcile its interpretation of nonapplicability with the cited statutory definitions which extend retention reemployment preference to "each employee" without qualification. 5 U.S.C. §§ 105, 3501(b) (1982).

We hold that the overriding intent of the Veterans Preference Act negates any viable distinction between the terms retention, hiring, or rehiring when it comes to the jurisdiction of the MSPB in veteran preference cases. We hold that the MSPB has jurisdiction of the preference claim of "each employee," competitive or excepted. We further hold as a matter of law that a proper preference claim was raised in petitioner's appeal to the MSPB in this case, as shown by the text thereof furnished to the court by the TVA in the appendix to its brief. Although mentioned four times in that appeal the issue was not addressed by the MSPB as it should have been. The TVA brief now concedes that petitoner did raise the rehiring issue as affected by the VPA. The MSPB must address this.

Petitioner failed to file a reply brief but at oral argument did dispute key factors asserted now by TVA which were not the subject of MSPB findings. Accordingly, we cannot review those facts on the present record, as already stated herein. Cogent but disputed arguments by the parties will not substitute for findings. This appellate court does not try or find the facts. Our authority is only to review, as limited by 5 U.S.C. § 7703(c) (1982). We reject the view that only a question of law remains to be decided in this case. Petitioner should have the opportunity to establish facts before MSPB to show, among other things, that required procedures were invalid or, if not invalid,

were properly followed by petitioner in asserting his veterans preference in a timely way; that TVA did not properly apply its procedures to him; and that he was not accorded full preference required by the facts and the law and is entitled to the reinstatement, back pay, and costs he claims. The case is remanded for further proceedings consistent with this opinion.

REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). AT03518810283

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

DISMISSED.

ENTERED BY ORDER OF THE COURT

DATED DEC 19 1989 /s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: JAN 9 1990

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: DEC 20 1989

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.
Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

NOBLE V TVA, 88-3436
(MSPB - AT03518810283)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3436

GEORGE NOBLE,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

Jay E. Emerson, Jr., Higgs & Conchin, of Huntsville, Alabama, argued for petitioner.

Ronald E. Klipach, Tennessee Valley Authority, of Knoxville, Tennessee, argued for respondent. With him on the brief were *Edward S. Christenbury*, General Counsel, *Justin M. Schwamm, Sr.*, Assistant General Counsel and *Harriet A. Cooper*, Senior Litigation Attorney.

Appealed from: Merit Systems Protection Board

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER AT03518810283

DATE: JUN 24 1988

GEORGE NOBLE,

Appellant,

v.

TENNESSEE VALLEY AUTHORITY,

Agency.

Jay E. Emerson, Jr., Esquire, Higgs & Conchin, Huntsville, Alabama, for the appellant.

Thomas F. Fine, Esquire, Knoxville, Tennessee, for the agency.

BEFORE

Richard P. Klein
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

By petition filed March 2, 1988, the appellant timely appealed to the Board from the agency's action in separating him by the application of reduction-in-force (RIF) procedures from the position of Cement Mason at its Bellefonte Nuclear Plant, Hollywood, Alabama, effective Au-

gust 30, 1985.[1] The Board has jurisdiction to hear this appeal. 5 U.S.C. § 7701(a); 5 C.F.R. §§ 351.901 and 351.202(a)(1). However, for the reasons set forth below, the RIF action is AFFIRMED.

ANALYSIS AND FINDINGS

In a RIF appeal, the burden is on the agency to prove by preponderant evidence that the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion, and, when challenged, that the regulations were properly applied with respect to the appellant. 5 U.S.C. § 7701(c)(1)(B); *Bjerke v. Department of Education*, 25 M.S.P.R. 310, 312 (1984).

In the instant case, the appellant has not challenged the application of the RIF procedures to his situation. *See* Record of May 2, 1988 Conference Call, Appeal File, Tab 6 and Tr. 139. Thus, the only issue to be considered is the appellant's claim that the RIF was undertaken because of his age (60) and race (black). Tr. 75. In essence, the appellant's argument is an attack on the bona fides of the RIF action. And, the agency bears the burden of establishing that the RIF action was bona fide and not a disguised adverse action against the appellant. *Willson v. Department of the Army*, 25 M.S.P.R. 167, 170 (1984).

H. Keith Fogleman, who served as the Construction Management Assistant at Bellefonte Nuclear Plant from March 1983 until August 1986, testified that the completion date for the plant was extended on July 2, 1985. Tr. 7. As a result of this extension only 40% of the current work force was needed. Tr. 7-8. The decision was then made to cut the trades and labor work force by 60%. Tr.

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[1] The appellant initially filed a discrimination complaint with the agency concerning this appealable matter. The agency's final decision on the discrimination complaint was issued on February 10, 1988, and this appeal to the Board followed.

8. The final figures establish that the trades and labor work force was actually cut by 65%. Agency File, Tab 4f, Exhibit 8, Tab 24. Within the individual crafts, the reductions ranged from 43% of the operating engineers to 89% of the asbestos workers. *Id.* The cement masons were cut by 81%. *Id.*

The appellant does not deny that there was a lack of work at the Bellefonte Nuclear Plant as a result of the decision to extend the completion date for the project. What concerns him is the fact that 19 of 21 cement masons in his competitive level were separated as a result of the RIF, and that he had the the fact that 19 of the 21 cement masons in his competitive level were separated as a result of the RIF, and that he had the greatest retention standing of those who were separated. *See* Agency File, Tab 4f, Exhibit 7.

Jimmy M. Henard, Labor Superintendent, made the initial decision as to the number of cement masons to be retained. Tr. 33-34. He decided to reduce the number of cement masons to four (the job steward who had to be retained under the union contract, the cement mason foreman, and the two cement masons at the top of the retention register). Tr. 37.

The decision to retain only four cement masons was based on the fact that Henard knew that the craft would be responsible for supporting the pipefitters and applying a protective coating to the walls. Tr. 35-36. He also knew that the pipefitters had four hanger stations at four different locations within the building. Tr. 36. Thus, at least four cement masons were needed. *Id.* And, because Henard was unsure whether there would be any protective coating work, he decided that he would have sufficient personnel in the cement mason craft if just four were retained. Tr. 37.

Henard testified that the new work schedule, based upon the extension of the project's completion date, was pre-

sented in late September 1985. Tr. 39-40. Because this schedule called for some protective coating and concrete work, he determined that two more cement masons were needed. Tr. 40, 66. Robert L. Gifford and Oliver L. Kincherlow, who were lower on the retention register than the appellant, were rehired in October 1985. Tr. 42; Agency File, Tab 4f, Exhibit 7. Additional cement masons were hired thereafter, including the appellant. Tr. 43. In fact, the number of cement masons reached 12 at one point in time. Tr. 67. The number, however, never dropped below six from October 1985 until May 1988. Tr. 69. Kincherlow worked continually from October 1985 until May 1988, and Gifford was still employed as of May 1988. *Id.*

Henard acknowledged that, if he had known the revised work schedule before the RIF action, the appellant would have been retained. Tr. 73-74. But, Henard did not know the revised work schedule at the time he made the decision to retain only four cement masons. And, there is no evidence that Henard cut back to this number in order to be able to separate the appellant by RIF for any reason other thar lack of work—including his age and race.

Henard (a white employee who was 40 years of age at the time of the RIF now at issue) only served as Labor Superintendent for 6 weeks before he made the decision to retain just four cement masons. Tr. 31, 73. This decision was then approved by the construction superintendent. *Id.* The two individuals on the retention register who were retained, Ishmael Wales and Lester Graviet, are white. *See* Agency File, Tab 4f, Exhibit 8, Tab 21. However, both are older than the appellant who was 58 at time of the RIF action. *Id.*; Tr. 75. The other two cement masons who were retained, Michael Simmons (job steward) and Cecil Ransom (foreman), were younger than the appellant, although Ransom was 50. *Id.* Ransom is white and Simmons is black. *Id.*

The evidence presented by the appellant on the bona fides issue includes a rumor that management was going to release the individual below him on the retention register (Eddie Malone, black age 46) so that the appellant could also be released. *See* Agency File, Tab 4f, Exhibit 8, Tab 22. However, while it appears from the testimony that there was such a rumor, no one who heard that rumor, including the appellant, could trace its source to a member of management.

The appellant also contends that he was told by Henard that he could not keep all of the older employees on the job with the amount of work that had to be done. Henard denies this statement as it relates to the cement mason craft, and his testimony, in my view, is more credible than the appellant's testimony. Tr. 45-46; *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 460 (1987) (contradiction with other evidence is a factor to consider in assessing credibility). If it was really Henard's intent to retain younger employees, the logical course of action would have been to retain only Simmons (or Simmons and Ransom), and then rehire younger employees in October 1985. For, as already noted, Wales and Graviet were even older than the appellant. This was not done. In fact, of the two employees who were rehired for the longest period of time (Kincherlow and Gifford), one was 49 years old. Agency File, Tab 4f, Exhibit 8, Tab 22. And, there were younger employees who could have been rehired. *Id.* Moreover, the appellant himself was one of the individuals who was rehired as a cement mason after the RIF action now at issue—on three occasions by Henard at Bellefonte and on one occasion at another location which was under Bellefonte's jurisdiction.[2] Tr. 43.

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[2] The record reflects that some of the individuals who were rehired were requested by name and others were simply provided by the union hall at the agency's request for a certain number of cement masons. Yet, even in those instances where a particular individual was not

Henard did testify that he may have indicated that the RIF action would take away all of the strong backs in the laborer craft because a strong back is usually possessed by the younger employees who are generally separated first in a RIF action. Tr. 45. Even if made, this true statement serves in no way to establish that the appellant, a cement mason, was reached for release from his competitive level because of his age.

Based upon the probative evidence in the record, I reject the appellant's contention that the RIF action was taken for the specific purpose of terminating him because of his age, race, or any other reason personal to him. Rather, the action was based upon Henard's assessment as to the number of employees in the cement mason craft who would be needed as a result of the lack of work. His determination was rational and well-founded at the time it was made. And, the fact that circumstances changed in late September 1985 is no basis for overturning now the action at issue. In this regard, the record reflects that the new work schedule was prepared by agency employees in Knoxville, Tennessee, not by Henard or anyone else at Bellefonte. Tr. 52.

I find that the agency proved by preponderant evidence that its reason for undertaking the RIF action was legitimate and not simply a subterfuge to terminate the appellant.[3]

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requested by name, the agency had the authority to do so. The agency also had the authority to reject a name submitted by the union. Tr. 69. Thus, even if the appellant was never requested by name, this fact would be of no consequence to the claims raised herein. However, Henard testified that the appellant was on the list of names which he submitted for consideration by the union on the three occasions when the appellant was rehired after the RIF action. Tr. 72.

[3] The appellant's claims of age and race discrimination also constitute affirmative defenses. Because I have found that the agency did not consider the appellant's age or race in taking the RIF action, these affirmative defenses must necessarily fail and are hereby rejected.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Richard P. Klein
RICHARD P. KLEIN
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on JUL 29 1988, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your

petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose *not* to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be *received* by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

George Noble
116 Elaine Drive
Madison, AL 35758

Appellant's Representative

Jay E. Emerson, Jr.
HIGGS & CONCHIN
405 Franklin Street
Huntsville, AL 35801

Agency's Representative

Thomas F. Fine
Tennessee Valley Authority
400 Summit Hill Drive, E11 D65
Knoxville, TN 37902

OPM's Employee Relations Division

Timothy M. Dirks
Office of Personnel Managment
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

JUN 24 1988
(Date)

/s/ Kathi M. Cannon
Kathi M. Cannon
Legal Technician

APPENDIX E

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Historical and Revision Notes

Reviser's Note. Based on Title 28 U.S.C., 1940 ed., §§ 346 and 347 (Mar. 3, 1911, c. 231, §§ 239, 240, 36 Stat. 1157 [derived from Mar. 3, 1891, c. 517, § 6, 26 Stat. 828]; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of Title 28, U.S.C., 1940 ed.

Words "or in the United States Court of Appeals for the District of Columbia" and "or of the United States Court of Appeals for the District of Columbia" in sections

346 and 347 of title 28 U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of Title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 346 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement. 80th Congress House Report No. 308.

Cross References

Appeal from courts of appeals in bankruptcy cases, see section 47 of Title 11, Bankruptcy.

Detention of suspect security risks, review by Supreme Court upon certiorari or certification as provided in this section, see section 821(d) of Title 50, War and National Defense.

Economic poisons, registration of; review by Supreme Court upon certiorari or certification, see section 135b(d) of Title 7, Agriculture.

Quorum of Supreme Court justices, see section 2109 of this title.

Review generally, see section 2101 et seq. of this title.

Review of appeals of orders of Secretary of Health, Education, and Welfare respecting approval of construction projects for State mental retardation facilities and community mental health centers, see section 2694 of Title 42, The Public Health and Welfare.

Review of appeals of orders relating to use of pesticide chemicals on raw agricultural commodities, see section 346(a) (i) of Title 21, Food and Drugs.

Time for appeal or certiorari, and stay, see section 2101 of this title.

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Writs, see section 1651 of this title.

Rules of the Supreme Court

Procedure generally on appeal, writ of certiorari, or certification of questions, see Rules of the Supreme Court.

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APPENDIX F

TENNESSEE VALLEY AUTHORITY HANDBOOK FOR VETERANS

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This handbook was prepared for the purpose of keeping TVA managers, employees, and applicants for employment better informed of the rights and benefits of veterans within the Tennessee Valley Authority.

I hope that you use it and pass it on to all concerned. If you have any questions, please feel free to contact our Manager of Veterans Affairs.

/s/ William H. Thompson
William H. Thompson
Manager of Employee Relations

I. INTRODUCTION

The purpose of this handbook is to inform TVA employees and applicants for employment of the employment preferences and benefits provided for veterans and certain others who have a preference derived from a veteran's service ("preference eligibles").

It contains an explanation of the principal legislation affecting veterans and other preference eligibles in their employment with TVA. This legislation includes the Veterans' Preference Act of 1944, as amended, which requires that preference be given to veterans and other preference eligibles in appointments to TVA positions and in retention during any reduction in force, and requires that certain procedures be followed in certain adverse actions; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 under which TVA develops an annual Disabled Veterans Affirmative Action Plan (DVAAP) designed to promote the employment and advancement of disabled veterans.

Included as appendixes to this handbook are summaries of certain services and resources provided to veterans by the Veterans Administration and private veterans' groups. Although this information does not directly relate to a veteran's TVA employment, it is provided here as a service to help veterans find other sources of information.

This handbook is intended only as a guide to the employment rights and benefits of veterans. Managers or other employees who need further information regarding a particular application of these laws should consult their personnel officer or the Manager of Veterans Affairs who can answer such questions or refer them to the appropriate TVA organizations.

II. THE VETERANS' PREFERENCE ACT

A. General.

The Veterans' Preference Act of 1944 (VPA), as amended, provides the statutory basis for providing preference in selection for appointment, and for retention in reduction in force, to eligible veterans and, in certain cases, to the spouses, widows or widowers, or mothers of veterans. In addition, this law, as amended, provides certain procedural rights to veterans in adverse actions and reductions in force. The VPA continued the longstanding Federal policy of extending certain preferences in Federal employment to those honorably discharged veterans who left their civilian careers, lost economic benefits and job-related opportunities, and often risked their lives while serving in the armed services during wartime. The VPA has been amended several times since 1944 and is codified in various sections of Title 5, United States Code.

TVA's procedures for giving preference to veterans in selection for appointment and for retention in reduction in force are in accord with the VPA, as amended, and applicable Office of Personnel Management (OPM) regulations issued pursuant to that act. Because TVA positions are not in the competitive civil service, but rather in the excepted service, and because TVA had established a separate personnel system pursuant to Section 3 of the TVA Act, the Civil Service Commission (the predecessor to OPM) and TVA in 1945 worked out special arrangements in which the intent of the VPA was met while maintaining the personnel system and appointment procedures that TVA had developed to meet its employment needs.

The subsections below will describe who is entitled to preference under the VPA, and how preference

to such qualified veterans and other preference eligibles is implemented in TVA. More detailed information is contained in TVA Instruction III VETERANS, PM Section 7.

B. Who is Eligible for Veterans Preference.

All individuals entitled to some preference under the VPA are called "preference eligibles." Not all veterans are entitled to veterans preference, not all "preference eligibles" are themselves veterans, and not all "preference eligibles" receive the same level of preference under the VPA. Listed below are three groups of individuals who are entitled to some preference and are included in the term "preference eligible." The first two groups include only veterans; the third includes persons, such as spouses, widows or widowers, or mothers of certain veterans, whose preference is "derivative," i.e., derived from the military service of the deceased or disabled veteran.

1. "Veterans" - includes any United States citizen who was separated with an honorable discharge or under honorable conditions from active duty in the armed forces and performed:

   - during a war;
   - in a campaign or expedition for which a campaign badge has been authorized;
   - during the period April 28, 1952 through July 1, 1955; or
   - for more than 180 consecutive days, other than for training, any part of which occurred during the period beginning February 1, 1955 and ending October 14, 1976.

   A person who entered on active duty in the armed forces after October 14, 1976 and before

September 8, 1980 does not qualify for preference unless he or she: (a) served during a war or campaign or expedition for which a campaign badge has been authorized, or (b) is a disabled veteran. A person who enlisted in the armed forces after September 7, 1980, or who entered on active duty (through means other than enlistment) on or after October 14, 1982, does not qualify for preference unless he or she: (a) served during a war or in a campaign or expedition for which a campaign badge has been authorized and has completed 24 months of continuous service or the full period called or ordered to active duty; or (b) served during a war or in a campaign or expedition for which a campaign badge has been authorized and was discharged early under 10 U.S.C. § 1171 or for hardship under 10 U.S.C. § 1173; or (c) is a disabled veteran.

2. "Disabled Veteran" - includes any person who served on active duty in the armed forces and was separated under honorable conditions and who has established the present existence of a service-connected disability (a noncompensable disability or one of less than 10 percent) or is receiving compensation (i.e., 10-percent or more disability), disability retirement benefits, or pension because of a public statute administered by the Veterans Administration or the Army, Navy, Air Force, Coast Guard, or Marine Corps. A veteran who has been awarded the Purple Heart for wounds received in action is considered to have a service-connected disability.

   Disabled veterans are generally entitled to a greater preference than undisabled veterans; among disabled veterans, the amount of preference is generally related to the extent of dis-

ability, as reflected in the following three preference categories;

(a) "Disability preference" - the additional preference every disabled veteran receives even if no compensation is received for the disability.

(b) "Compensable disability preference" - a disabled veteran with a compensable service-connected disability of 10-percent or more receives even greater preference in consideration for appointment to certain positions.

(c) "30 percent compensable disability preference" - a disabled veteran with a compensible service-connected disability of 30 percent or more receives the preferences given to individuals in categories (a) and (b) above, and in addition receives retention preference over other veterans in reductions in force.

3. "Derivative preference" - persons who are entitled to veterans' preference based on the military service of another person. These are three categories of derivative preference, each of which is described below:

a. Spouse of a "disabled veteran"—The spouse of a disabled veteran who, because of a service-connected disability, has been unable to qualify for a Federal position, or other position, along the general lines of his or her usual occupation. If the disabled veteran uses his/her preference, the spouse is not entitled to preference.

b. Widow or Widower of a Veteran—The unremarried widow or widower of a veteran who served on active duty during any war,

or during the period April 28, 1952 through July 1, 1955, or in any campaign or expedition for which a campaign badge or service medal was authorized. This preference applies only to the widow or widower of a veteran meeting any of these service requirements or who died while in the armed forces, unless the circumstances surrounding the death would have been cause for other than honorable separation from the service.

c. Mother of a Veteran—The mother of a veteran who died under honorable conditions while on active duty in a war or in a campaign or expedition for which a campaign badge or service medal has been authorized, or during the period April 28, 1952 through July 1, 1955, or who became permanently and totally disabled because of a service-connected disability. She is entitled to preference provided that she is widowed, divorced, or separated from the father of the veteran and has not remarried, or the father is permanently and totally disabled. An otherwise eligible mother who has remarried may be granted preference only if, with reference to the subsequent marriage, her husband is permanently and totally disabled, or she is divorced or legally separated, or she has been widowed. If the disabled veteran uses his/her preference, then the mother of the veteran is not entitled to a preference.

Both a mother and a spouse (including widow or widower) may be entitled to preference on the basis of one veteran's service if both meet the requirements. However, no derivative preference is available if the veteran is living and

is qualified for Federal employment or is currently using his/her preference.

As of October 1, 1980, the term "preference eligible" includes a retired member of the armed forces only if the member: (1) is a disabled veteran, or (2) retired below the rank of major or equivalent and otherwise satisfies the definition of veteran as described in Section 1 above. A retired member who satisfies these requirements will receive a preference in selection for appointment as a veteran or disabled veteran, as appropriate, but generally not for reduction-in-force purposes, with certain exceptions as noted in Section II-D below.

The responsibility for determining status as a preference eligible is in the Employment Branch, Division of Personnel. Veterans are responsible for providing TVA with the documentation necessary to make this determination; upon request, TVA will assist the veteran in this effort. Any person who disagrees with the decision of a project personnel officer or Employment Branch officer regarding his or her veterans preference status may appeal the matter to the Chief of the Employment Branch.

C. Preference in Appointments

TVA gives preference to "preference eligibles" in selection for appointment to a TVA position. The VPA does not provide preference to such eligibles in selection for promotion, transfer, or reassignment.

In filling a job from among outside applicants, a veteran with a compensable military service-connected disability of 10-percent or greater is considered first, if qualified, for the job being filled.

The remaining applicants are generally placed, according to their qualifications for the job, into one of the three following groups: (1) outstanding, (2) well qualified, or (3) qualified. Applicants in group 1 are considered first. If there are no applicants in group 1, selection is from group 2; if there are no applicants in group 2, selection is made from group 3. Within each of these groups, noncompensable disabled veterans (below 10-percent disability) and people with derivative preference are selected before the other applicants. Nondisabled veterans are considered next before nonveterans. The order of preference is as follows:

a. Veterans who are qualified or better and who have a compensable service-connected disability, in the order of their qualifications.

b. Veterans with a noncompensable disability and persons with derivative preference whose qualifications are outstanding.

c. Nondisabled veterans whose qualifications are outstanding.

d. Nonveterans whose qualifications are outstanding.

e. Veterans with a noncompensable disability or persons with derivative preference who are well-qualified.

f. Nondisabled veterans who are well-qualified.

g. Nonveterans who are well-qualified.

h. Veterans with a noncompensable disability and persons with derivative preference who are qualified.

i. Nondisabled veterans who are qualified.

j. Nonveterans who are qualified.

In selection for professional and scientific positions at or above grades SA-2, SC-2, SD-2, and M-2, there is an exception to the above procedure as it applies to a compensably disabled veteran (i.e., one with a 10 percent or greater disability). For those jobs, such veterans, if qualified, are placed in one of the three groups described above (i.e., outstanding, well-qualified, or qualified) and receive the same preference within these groups as the noncompensable disabled veteran and those with derivative preference. Therefore, within each group, the order of preference is: (1) the disabled veteran (and any with derivative preference), (2) the nondisabled veteran, and (3) the nonveteran.

TVA generally uses a "call-by-name" procedure to fill trades and labor hourly positions with outside candidates. Managers may request, by name, certain candidates based on their qualifications to do the work. The employment office then generally calls the appropriate union designating the requested individuals by name for referral from the union. When such trades and labor hourly positions are filled by outside candidates, preference eligibles who: (1) are available; (2) complied with applicable procedures in asserting ("exercising") their preference; and (3) live in the commuting area of the job (generally, 60 miles), are considered before similarly qualified nonpreference eligibles, even if the nonpreference eligible was "called by name." Among similarly qualified preference eligibles, preference is given in the following (descending) order: (1) veterans with a 10-percent or greater compensable military service-connected disability (such candidates, if qualified, are always hired before any other outside applicant.); (2) other disabled veterans (less than 10-percent disability) and

those individuals with derivative preference; and (3) undisabled veterans. A

Retention Group III (Indefinite tenure; employees with temporary appointments who completed one year of current service are considered to have indefinite tenure for RIFs)	AD.	Employees with veterans' preference in RIF who have compensable, service-connected disabilities of 30 percent or more and indefinite tenure.	
	A.	Employees with veterans' preference in RIF not included in subgroup AD and indefinite tenure.	
	B.	Other employees with indefinite tenure.	FIRST Released

In a reduction, employees in Group III are reached first, then Group II, and those in Group I are the last to be released. Within each of these tenure groups, nonveterans (subgroup B) are released first, veterans and other preference eligibles (subgroup A) are released second, and veterans with a 30-percent or greater "compensable military, service-connected disability" are released last. Within any subgroup (AD, A, or B), the employee with the least creditable service (calculated using OPM regulations) is released first. Employees on temporary appointments whose current period of employment has been for less than one year and who are preference eligibles are not entitled to veterans preference in layoffs in which they are involved. All less-than-one-year temporary employees in a competitive level are released without regard to veteran status before a RIF is held among employees in Retention Groups I, II, and III.

Most military retirees are not given preference eligible status during RIFs. As stated earlier in Section II-B, a military retiree who retired at the

grade of a major or above (or its equivalent) generally is not considered a preference eligible for appointment or retention preference in a RIF unless the individual is a disabled veteran. Further, even one who retired below the grade of major after 20 or more years of full-time active service is generally not given preference unless the retirement was based on disability resulting from an injury of disease received in the line of duty as a direct result of armed conflict, or caused by an instrumentality of war and incurred in the line of duty during a period of war. A military retiree who is not a preference eligible for RIF purposes will receive creditable service during a RIF for only that time in active military service during a war, or in a campaign or expedition for which a campaign badge has been authorized.

E. Procedural Protections and MSPB Appeal Rights for Preference Eligibles*

A preference eligible (as described in Section II-B above) who has completed one year of current, continuous service in the same or similar positions has certain procedural rights in the event of an adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less). In an adverse action, such preference eligibles are entitled to: (1) at least 30

* NOTE: Preference eligibles also have the same right to file adminisrative (EEO) complaints alleging discrimination (based on age (over 40), race, color, national origin, religion, sex, or handicap) as do other TVA employees or applicants for TVA positions. However, if a preference eligible challenges an adverse action by filing a EEO complaint before filing an MSPB appeal, MSPB will not consider the matter until after a final TVA decision is rendered on the EEO complaint or 120 days have passed since the EEO complaint was filed.

days' advance notice (notice of proposed action) in most situations; (2) a reasonable time, not less than 7 days, to answer orally and in writing to the proposed action; (3) be represented by an attorney or other representative; (4) a written decision and the reasons for the decision; and (5) the right to appeal to the MSPB, which will review whether TVA followed these procedural requirements and whether the action promotes the efficiency of the service. Preference eligibles may also appeal RIF actions to the MSPB. In any appeal, a represented employee may instead elect to appeal the action through the appropriate negotiated internal grievance procedure; however, the employee cannot appeal under both procedures.

F. Other VPA Provisions Affecting Employment of Veterans

In addition to the provisions described above, several other statutory provisions affecting employment are described below.

1. Where a position requires certain experience as an element of qualification, a preference eligible is entitled to credit for service in the armed forces when that applicant's employment in a vocation similar to that for which the employee is being considered was interrupted by military service, and for all experience material to the position gained in religious, civic, welfare, service, and organizational activities, regardless of whether the preference eligible received pay for that work.

2. In determining qualifications of a preference eligible, age, height, and weight requirements are waived unless the requirement is essential to the performance of the duties of the position. Other physical requirements shall be waived if,

in TVA's opinion and after considering the recommendations of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

3. A preference eligible who has been separated or furloughed without delinquency, misconduct, or request is entitled to have his or her name placed on appropriate employment lists for every position for which they were qualified.

III. DISABLED VETERANS AFFIRMATIVE ACTION PROGRAM (DVAAP)

A. General

Pursuant to Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 and Office of Personnel Management regulations, TVA's Equal Opportunity Staff prepares an annual DVAAP plan to promote and carry out affirmative action with respect to disabled veterans. For purposes of this plan, a "disabled veteran" is defined as "a person entitled to disability compensation under laws administered by the Veterans Administration for a disability rating of 30 percent or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in line of duty."

B. Goals of DVAAP

TVA's current objectives for its DVAAP are:

1. To increase the number of job-qualified disabled veteran applicants on TVA employment registers.

2. To increase internal advancement opportunities for disabled veterans through career planning and upward mobility oppportunities.

3. To provide managers and supervisors awareness training and information pertaining to the policies and procedures of the DVAAP.
4. To increase disabled veterans input into affirmative action issues and concerns and to provide opportunities for awareness of TVA policies, procedures, and legislation affecting their employment.
5. To increase managers' and supervisors' understanding of the reasonable accommodation concept and its application in meeting career advancement needs of certain disabled veterans.

C. Relationship of the DVAAP to the Rehabilitation Act of 1973 (Employment of Handicapped Individuals)

Pursuant to the Rehabiliation Act of 1973, some disabled veterans have a medical condition for which they would be considered "handicapped individuals." In addition to prohibiting discriminating against a "qualified" physically or mentally "handicapped person," TVA makes reasonable accommodations to the known physical or mental limitations of a qualified handicapped applicant or employee, unless the accommodation imposes undue hardship on TVA's operations. Further information on TVA's Affirmative Action Plan for Handicapped Individuals can be obtained from the Equal Opportunity Staff.

IV. TVA ORGANIZATIONS INVOLVED IN MATTERS AFFECTING VETERANS

Listed below are some of the TVA organizations whose functions and responsibilities have a direct impact on the employment of veterans at TVA.

A. Division of Personnel

The Division of Personnel assists offices and divisions in TVA in the planning, acquisition, devel-

opment, maintenance, and adjustment of the total human resource in TVA. It works with personnel representatives throughout the agency to promote continuing sensitivity to and recognition of the importance of human resource management. Some of the more important functions performed by the Division of Personnel are: (1) recruitment, training, and development and associated tasks; (2) organization and administrative relations; and (3) related aspects of personnel and general administration.

— Veterans Affairs

Serves as an advocate for all veterans within TVA. Monitors the agency's DVAAP. Provides training and workshops relating to veterans concerns. Develops Individual Development Plans for all veterans covered under affirmative action. Provides career counseling and referrals to other organizations in and outside of TVA when deemed necessary.

— Employee Relations and Development Branch

Responsible for individual and organizational development efforts.

Develops and implements agency-wide training programs and conducts training assessment surveys.

— Employment Branch

Responsible for recruitment, examining, certification, referral, and employment processing to meet agency-wide human resource requirements and reach affirmative action goals. Gives advice on the application of various veterans' programs that relate to employment.

— College and Professional Relations Staff

This part of the Employment Branch provides general recruitment and placement services for occupational categories involving professional, technical, and administrative job descriptions.

— Area Employment Offices

Helps all divisions meet their current and future staffing requirements with special emphasis placed on affirmative action goals.

Maintains local employment register, certifies and refers candidates to divisions, make offers of employment, and processes new employees for appointment.

Provides information on employment policies and procedures.

Explains and enrolls new employees in various benefit plans during employment processing.

B. Division of Medical Services

The Division of Medical Services proposes policies and provides occupational, medical, and related health services for employees and others in the workplace who may be affected by TVA activities.

Works closely with the Office of Workers' Compensation Programs of the U.S. Department of Labor in helping to administer compensation benefits to employees who are injured on the job or who suffer from job-related illnesses.

Participates in health assessment and development projects and special health programs in cooperation with Federal, State, and local agencies and organizations.

— Area Medical Services

These are geographically defined area offices

which provide employees medical services supervised by a physician who is chief of each respective area Medical Service.

Each chief of the area Medical Service is responsible to the Medical Director for establishing and providing health services in accordance with administrative policies and professional standards.

Provides preplacement physicals and gives medical and surgical treatment for on-the-job injuries and medical follow-up of injuries and illnesses.

Responsible for medical control of occupational health hazards and sicknesses which endanger the worker.

Ensure that each impaired worker is placed in a job which is both safe and productive.

Develops plans which ensure the coordination and development of community and agency cooperation on health problems of joint concern to both.

— Health Counseling and Rehabilitation Branch

The Health Counseling and Rehabilitation Branch develops, coordinates, implements, and evaluates agency plans to promote mental health and effective placement of TVA employees. Services tailored to meet branch goals are described below:

- Improves employee productivity by identifying and resolving psychological and behavioral problems.
- Provides professional counseling and assistance for employees who have health or job-related physical impairments.

- Assists TVA physicians in assessing mental health and capacity for duty of employees or applicants for employment with a history of mental or emotional problems.

— Employee Assistance Program

Provides employee counseling and referral to community assistance or treatment centers for employees experiencing substance use disorders, financial, marital, or other similar problems.

Provides consultative opinions to managers and supervisors when personal or emotional problems impair the work performance of employees.

Consults with TVA physicians regarding fitness for duty and severity of chemical and other drug misuse problems among employees.

C. Equal Opportunity Staff (EOS)

The EOS has the responsibility to monitor and evaluate affirmative action program plans, providing development and implementation of these plans for minorities, women, disabled veterans, Vietnam Era veterans, and handicapped employees and applicants; the adherence to external regulatory mandates and TVA policy is thus ensured.

The Staff also has the responsibility for monitoring and evaluating agency personnel policies and programs to determine their impact on protected class groups.

Some of the important functions of the EOS are:

1. Issues internal guidelines of the development and maintenance of affirmative action plans and reviews and approves such plans prior to their submission to the General Manager and TVA Board.

2. Manages agency-level affirmative action programs for minorities, women, and handicapped persons.

3. Advises the General Manager on significant matters arising under EEO and affirmative action policy and recommends revisions in these policies.

4. Ensures effective application of affirmative action programs and EEO policy by requiring corrective action in cases in which affirmative action programs and EEO policy have not been implemented.

5. Improves the conditions that affect the employability and retention of protected class groups by participating in community programs and activities on employment.

6. Provides impartial counseling to employees and applicants who believe they, or the class they propose to represent, have been discriminated against because of race, color, religion, sex, national origin, handicap, or age; and it attempts to resolve, informally, the matters raised by them.

7. On complaints alleging discrimination because of race, color, religion, sex, national original, handicap, or age, the Director of EEO renders final TVA decisions, other than those decisions reserved to the Board and General Manager, and orders such corrective and remedial measures as may be considered necessary.

APPENDIX 1

SUMMARY OF THE APPLICATION OF THE VETERANS' PREFERENCE ACT IN TVA

Personnel Action	Veteran's Preference Act Applies	Does Not Apply
Filling a job with a current TVA employee		X[2]
Filling a job from applicants outside the agency (initial appointment)	X[1]	
Promotion		X[2]
Layoff under negotiated labor agreements		X
Dog off		X
Reduction in force	X[3]	
Adverse action against a veteran (discharge, suspension of more than 14 days reduction in grade or pay)	X[4]	
Assignment of overtime		X
Transfer		X

---

1. Veterans with a 10-percent or greater "compensable military service-connected disability" who are qualified for the job are selected, if available. Then, among similarly qualified applicants, noncompensable disabled veterans (less than 10-percent) and those with derivative preference are chosen first, followed by veterans, and finally nonveterans.

   - Appointment to some entry-level jobs (elevator operator, janitor, orderly, mail clerk) are "reserved" for preference eligibles.

- For selections for professional and scientific positions at or above grades SA-2, SC-2, SD-2, SX-2, and M-2, veterans with a 10-percent or greater "compensable military service-connected disability" are treated like other noncompensable disabled veterans (less than 10-percent disability) and those with derivative preference.

2. Some disabled veterans may be eligible for affirmative action consideration if covered under the agency's plans for affirmative action for handicapped individuals or for disabled veterans, but the Veterans' Preference Act does not apply to promotions.

3. In RIFs, employees competing with each other for work are listed on a retention register in the following order: Group I - those with permanent tenure; Group II - those with prepermanent tenure; and Group III - those with indefinite tenure plus those with temporary appointments who have completed one year of current, continuous service. In a RIF, those in Group III are reached first, then group II, and those in Group I are the last to be released. Within each of these tenure groups, nonveterans are released first, preference eligibles are released second, and veterans with a 30-percent or greater "compensable military service-connected disability" are released last.

4. A veteran with more than one year of current service is entitled to have an adverse action processed under applicable Federal regulations and to appeal that action to the MSPB.

APPENDIX 2

OUTSIDE PROGRAMS AND RESOURCES TO ASSIST THE VETERAN

NOTE: The materials in Appendixes 2A through 2E describe resources available outside TVA to assist veterans. TVA does not administer these programs but is providing information on them as a service to its employees. For further information, contact the sources listed in the appendixes.

APPENDIX 2A

VOCATIONAL REHABILITATION FOR VETERANS

Description of Program

Vocational rehabilitation is a program provided by the Veterans Administration to assist the service-connected disabled veteran to secure and keep suitable employment. It also helps certain veterans to achieve maximum independence in daily living. Veterans Administration counselors help each individual plan a program suited to his or her specific needs; all programs are designed to provide the services and financial assistance necessary to make them successful. Some of the services and benefits which can be provided include:

- Education or training to qualify for employment.
- Educational, vocational, and personal counseling.
- Tutorial assistance, reader service, or other special help in training, if needed.
- Medical and dental treatment, prosthetic aids, special equipment, and special restorative services necessary to enter and stay in training.
- Job counseling, planning, placement, and adjustment to enable the individual to obtain and maintain suitable employment.
- Assistance necessary to achieve maximum independence in daily living.

Eligibility

The following conditions make a veteran eligible for vocational rehabilitation services and benefits for the veterans:

- Having a compensable disability as a result of active service during World War II or thereafter.

- Having been discharged, released, or retired from service under other than dishonorable conditions.
- The Veterans Administration determines that you need rehabilitation because of an employment handicap.
- Your period of eligibility has not expired.

Eligibility Period

- The veteran generally has 12 years from date of discharge to complete his rehabilitation program if he/she has been found to be entitled to assistance; however, if certain conditions prevented the veteran from pursuing rehabilitation or he/she is found to have a serious employment handicap, they may still be eligible even if it has been 12 years from their date of discharge. The period of eligibility does not begin until it has been established that the veteran has a compensable service-connected disability. Veterans with a serious handicap to employment are sometimes granted longer periods to complete their rehabilitation.
- Veterans are entitled, if otherwise eligible, to receive as much assistance as necessary to achieve maximum independence in daily living or to qualify for the occupation the veteran and his or her Veterans Administration counselor agree is suitable. Training will usually not exceed 48 months, but more may be provided if necessary. Placement and post-placement counseling may be provided for a period not in excess of 18 months. Even though most veterans pursue rehabilitation full time, it is possible to train on a three-quarter or half-time basis.

The eligible veteran may be given:

- Assistance to achieve maximum independence in daily living.
- College or university education.
- Trade, business, or technical school education.

- Apprenticeship or on-the-job training
- On-farm training
- Training in a rehabilitation facility, a sheltered workshop, or in the veteran's home, if their disability required it; or a combination of these.

Provisions for Financial Assistance

In securing financial assistance, the veteran may exercise two options:

1. The Veterans Administration may pay training expenses, including tuition, fees, necessary books, supplies, equipment, and will provide a monthly subsistence allowance while the veteran is in training. This is in addition to any compensation or other benefits the veteran may receive.
2. The other option is that the individual may elect to receive the rate he/she would receive if they were training under the G.I. Bill. Under this option, the individual receives only that payment and he/she has to pay all their tuition fees, books, and supplies. The Veterans Administration counselor can assist you in deciding which is the best option for you.

The following chart is a schedule of monthly subsistence payments made by the Veterans Administration effective October 1, 1986:

MONTHLY RATE OF SUBSISTENCE ALLOWANCE

Chapters 34 and 35

TYPE OF TRAINING	NO DEP.	ONE DEP.	TWO DEP.	ADD'L AMT. FOR EACH DEPT. OVER TWO
Institutional*				
Full-time	$376	$448	$510	$30
Three-quarter	283	336	383	24
Half-time	288	224	255	17
Apprenticeship and on-the-job				
1st 6 months	274	307	336	14
2nd 6 months	205	239	267	14
3rd 6 months	136	171	198	14
4th 6 months	68	101	131	14
Far Cooperative				
Full-time	304	355	404	23
Three-quarter	228	266	303	18
Half-time	152	178	202	12
Cooperative	304	355	404	23
Chapter 31				
Institutional*				
Full-time	$310	$384	$452	$33
Three-quarter	233	288	339	25
Half-time	155	193	227	17

* Institutional training includes IHL (institution of higher learning), NCD (noncollege degree), and nonpay or minimal pay OJT (on-the-job training) or work experience.

Farm Cooperative/ Apprenticeship/OJT				
Full-time	271	327	377	24
Extended Evaluation/ Independent Living				
Full-time	310	384	452	33
Three-quarter	233	288	227	25
Half-time	155	193	227	17
Quarter-time	78	96	113	9

Effective 10-01-86

Other Rehabilitation Related Services

Special Employment Assistance

The veteran can receive employment assistance from the Veterans Administration under (certain conditions, even if he/she is not entitled to other services. In order to receive employment assistance he/she must have:

- A compensable service-connected disability.
- Previously been in the Veterans Administration vocation rehabilitation program or a state vocational rehabilitation program.
- Experience, training, and physical capacity to engage in regular employment.

Special Provisions for the Severely Disabled

Special assistance is provided for certain severely disabled veterans, including assistance in becoming self-employed, and for those who cannot become employable but can benefit from services to improve their ability to live independently.

Making Application for Vocational Rehabilitation Services

If you are a veteran with a service-connected disability and wish to apply for vocational rehabilitation, send Veterans Administration Form 28-1900, for vocational rehabilitation, or write to the nearest Veterans Administration office.

Veterans Administration Locations in the TVA Region Where Benefit Applications May be Filed.

Alabama
Montgomery 35104
474 South Court Street

Georgia
Atlanta 30365
730 Peachtree Street NE.

Kentucky
Louisville 40202
600 Federal Place

Mississippi
Jackson 39269
100 West Capitol Street

North Carolina
Winston-Salem 27155
Federal Building
251 North Main Street

Tennessee
Nashville 37203
110 Ninth Avenue S.

Virginia
Roanoke 24011
210 Franklin Road, SW.

APPENDIX 2B

VETERANS ADMINISTRATION MEDICAL FACILITIES IN THE TVA REGION

The following list of abbreviations denotes the types of installations providing services:

H-Hospital Care; D-Domiciliary Care; NHC-Nursing Home Care; OC-Outpatient Clinic (independent); OCH-Outpatient Clinic (physically separated from hospital); OCS-Outpatient Clinic Substation; and RO-Regional Offices

Alabama

Birmingham (H) 35233
700 South 19th Street
(205) 933-8108

Mobile (OCS) 36617
2451 Fillingham Street
(205) 690-2287

Montgomery (RO) 35104
474 South Court Street
(205) 262-7781

If you reside in the local telephone area, to call Regional Office:

Birmingham	322-2492
Huntsville	539-7742
Mobile	432-8645

All other areas in Alabama: (800) 392-8054

Tuscaloosa (H & NHC) 35404
Loop Road
(205) 553-3760

Tuskegee (H & NHC) 36083
(205) 727-0550

Georgia

Atlanta (RO) 30365
730 Peachtree Street, NE.

Augusta (H & NHC) 30910
2460 Wrightsboro Road
(404) 321-6111

Dublin (H, C, & NHC) 31021
(404) 912-1210

If you live in the local telephone area, to call Regional Office:

Albany	439-2331
Atlanta	881-1776
Augusta	738-5403
Columbus	324-6646
Macon	745-6517
Savanna	232-3365

All other Georgia areas: (800) 282-2032.

Kentucky

Lexington (H & NHC) 40507
Leestown Road
(606) 233-4511

Louisville (RO) 40202
600 Federal Place

Louisville (H) 40202
800 Zorn Avenue
(502) 895-3401

If you live in the local telephone area, to call Regional Office:

Lexington	253-0566
Louisville	584-2231

All other Kentucky areas: (808) 292-4562

North Carolina

Asheville (H & NHC) 28805
(704) 298-7911

Durham (H) 27705
508 Fulton Street
(919) 286-0411

Fayetteville (H & NHC) 28301
2300 Ramsey Street
(919) 488-2120

Salisbury (H & NHC) 28144
1601 Bremmer Avenue
(704) 636-2351

Winston-Salem (OCH) 27102
Federal Building
251 North Main Street
(919) 761-3562

If you live in the local telephone area, to call Regional Office:

Asheville	531-6861
Charlotte	375-9351
Durham	683-1367
Fayetteville	323-1242
Greensboro	274-1994
High Point	887-1202
Raleigh	821-1166
Winston-Salem	748-1800

All other North Carolina areas: (800) 642-0841

Mississippi

Biloxi (H, D, & NHC) 39531
Pass Road
(601) 388-5541

Jackson (H & NHC) 39216
1500 East Woodrow Wilson Drive
(601) 362-4471

Jackson (RO) 39269
100 West Capital Street

If you live in the local telephone area, to call Regional Office:

Biloxi/Gulfport	432-5996
Jackson	960-4873
Meridan	693-6166

All other Mississippi areas: (800) 682-5270

Tennessee

Chattanooga (OCS) 37411
Building 6200 East Gate Center
(615) 899-4650

Knoxville (OCS) 37919
9047 Executive Park Drive
Suite 100
(615) 637-9300

Memphis (H) 38104
1030 Jefferson Street
(901) 523-8990

Mountain Home (H, D, & NHC) 37684
Lemont Street
(615) 926-1171
Johnson City (615) 826-1171

Murfreesboro (H & NHC) 37130
Lebanon Highway
(615) 893-1360

Nashville (RO) 37203
110 9th Avenue, S.

Nashville (South) (H) 37203
1310 24th Avenue
(615) 327-4751

If you live in the local telephone area, to call Regional Office:

Chattanooga	267-6587
Knoxville	546-5700
Memphis	527-4583
Nashville	254-5411

All other Tennessee areas: (800) 342-8330

Virginia

Hampton (H, D, & NHC) 23667
Emancipation Drive
(804) 722-9961

Richmond (H) 23249
1201 Broad Rock Road
(804) 231-9011

Salem (H & NHC) 24153
1970 Roanoke Boulevard
(703) 982-2463

Northern Virginia
Counties of Arlington and Fairfax, and
the other cities of Alexandria and Falls Church:

Washington, D.C. (RO) 20421
941 North Capital Street

If you live in the local telephone area, to call Regional Office:

Hampton	722-7477
Norfolk	627-0441
Richmond	648-1621
Roanoke	982-6440

All other Virginia areas: (800) 542-5826

APPENDIX 2C

WHERE TO APPLY FOR VETERANS ADMINISTRATION ALCOHOL OR DRUG DEPENDENCE TREATMENT

Patients may be admitted to any Veterans Administration Medical Center for inpatient care.

There are specialized Veterans Administration Alcohol Dependence Treatment Programs and Drug Dependence Treatment Programs for inpatient and/or outpatient care in the following cities:

Both Alcohol and Drug Dependence Treatment Programs

Veterans Administration Medical Center

Decatur, Georgia

Veterans Administration Medical Center

Memphis, Tennessee

Alcohol Dependence Treatment Programs Only

Veterans Administration Medical Centers:

Augusta, Georgia
(Lemonwood Division)
Biloxi, Mississippi
Birmingham, Alabama
Hampton, Virginia
Jackson, Mississippi
Lexington, Kentucky
Mountain Home, Tennessee
Murfreesboro, Tennessee
Nashville, Tennessee
Salem, Virginia
Tuscaloosa, Alabama
Hampton, Virginia

Drug Dependence Treatment Programs Only

Veterans Administration Medical Center
Richmond, Virginia

Veterans Administration Medical Center
Lexington, Kentucky

APPENDIX 2D

DISABLED AMERICAN VETERANS OFFICES IN THE TVA REGION

The Disabled American Veterans (DAV) were formed following World War I as a nonprofit self-help group for veterans with service-connected disabilities. DAV has many cost-free programs and services which center on the needs of the disabled veteran and his family. They include: (1) being both advocate and monitor of legislation affecting disabled veterans on the issues of disability, compensation, pension, health care, employment, vocational rehabilitation, death benefits, etc.; (2) providing expert counseling and claims representation to disabled veterans and their families through National Services Officers (NSO) of the DAV located in 67 cities, 49 states, and Puerto Rico; (3) DAV and NSO represent clients before various Government agencies; (4) sending DAV Field Service Units to rural and suburban areas to serve veterans living some distance from a DAV office; (5) providing a DAV Vietnam Vet Outreach Program which concentrates the skills of volunteer professionals on the difficult and unique readjustment problems of Vietnam Era veterans, particularly the post-traumatic stress disorder commonly called Post-Vietnam Syndrome; (6) providing disaster and energy relief for disabled veterans, as well as scholarships for children of needy disabled veterans; (7) advocating local employment programs and removal of architectural and other barriers to the handicapped; and (8) publishing a monthly news magazine dealing with a wide range of issues of concern to veterans. If you have general questions concerning rights and benefits earned by disabled veterans, you may send them to: Disabled American Veterans (DAV), P.O. Box 14301, Cincinnati, Ohio 45214, Area Code (513) 411-7300. To receive assistance on specific problems relating to benefit claims, mail them to: DAV National Service Headquarters, 807 Maine Avenue, SW., Washington, D.C. 20024.

The Following are Offices of the DAV Located in the TVA Region

ALABAMA

Disabled American Veterans
VA Regional Office
474 South Court Street
Montgomery, Alabama 36104
(205) 832-7044

GEORGIA

Disabled American Veterans
VA Regional Office, Room 584
730 Peachtree Street, NE.
Atlanta, Georgia 30308
(404) 881-2204

KENTUCKY

Disabled American Veterans
VA Center
600 Federal Place, Room 829
Louisville, Kentucky 40202
(502) 582-5849

MISSISSIPPI

Disabled American Veterans
VA Regional Office
Federal Building, Room 116
100 West Capitol Street
Jackson, Mississippi 39201
(601) 960-4822

NORTH CAROLINA

Disabled American Veterans
VA Regional Office
251 North Main Street
Winston-Salem, North Carolina 27102
(919) 761-3481

TENNESSEE

Disabled American Veterans
VA Regional Office
110 9th Avenue, South
U.S. Courthouse, Room A308
Nashville, Tennessee 37208
(615) 251-5735

VIRGINIA

Disabled American Veterans
VA Regional Office
Federal Building, Room 802
210 Franklin Avenue, SW.
Roanoke, Virginia 24011
(703) 982-6373

WASHINGTON

Veterans of Foreign Wars of the United States
Washington Office
VFW Memorial Building
200 Maryland Avenue, NE.
Washington, D.C. 20002-5799
(202) 543-2239

The American Legion
1608 K Street, NW.
Washington, D.C. 20006
(202) 861-2780

APPENDIX 2E

VETERANS ADMINISTRATION VET CENTERS

The Vet Centers were established to deal with the unattended problems of the Vietnam Era veterans. He/she had to deal with the "post-traumatic stress disorder" associated with combat experience and the social alienation which occurred when some of his countrymen criticized and rejected him for the part he/she played in the war. The psychological problems which confronted these veterans were so difficult and unique that they turned away from the traditional institutions that had served veterans of earlier wars.

The Vet Centers combine the principles of psychological therapy and counseling with an Outreach and Networking program which link all veterans needing assistance with all available support resources. Once veterans in a particular community have been identified and brought into the Vet Center program the following objectives are implemented: (1) to provide individual group, and family counseling to eligible Vietnam Era veterans and their families; (2) to assist veterans in obtaining medical care via referrals to the Veterans Administration Medical Center facilities; (3) to provide vocational and occupational assessments, counseling, and meaningful job development and placement; and (4) to act as liaison with potential employers emphasizing on-the-job training.

If the address and/or telephone numbers listed below have changed for any Vet Centers, contact your local telephone operator or the nearest Veterans Administration office.

Alabama

2145 Highland Avenue
Suite 250
Birmingham 35205
(205) 933-0500
Robert W. Day, Ph.D.
Team Leader

110 Marine Street
Mobile 36604
(205) 694-4194
Joe Law, Ed.D.
Team Leader

Georgia

65 11th Street, NE.
Atlanta 30309
(404) 347-7264
Del Perkins, M.S.W.
Team Leader

Kentucky

1117 Limestone Road
Lexington 40503
(606) 276-5269
Milton Bailey
Team Leader

Mississippi

158 East Pascagoula Street
Jackson 39201
(601) 363-4912
Joseph Adcock, M.S.
Team Leader

North Carolina

#4 Market Square
Fayette 28301
(919) 323-4908

Tennessee

151 East Magnolia Avenue
Suite 201
Knoxville 37917
(615) 971-5866
Ron Coffin
Team Leader

2 Northgate Park
Suite 108
Chattanooga 37415
(615) 875-5114
Jackie Daniels, M.S.W.
Acting Team Leader

One North Third Street
Memphis 38103
(901) 521-3506
Ed Wallin, M.S.W.
Team Leader

Virginia

7450 1/2 Tidewater Drive
Norfolk 23505
(804) 353-8985

BIBLIOGRAPHY

Disabled American Veterans. If You're A Vietnam Era Veteran. Cincinnati: National Headquarters, no date given. 17 pages.

National Center for Law and the Deaf. Section 501 of the Rehabilitation Act of 1973, by Larry G. Goldberg, Esq. The National Academy of Gallaudet College. Washington: Gallaudet Press, 1973. 14 pages.

Office of Personnel Management. Disabled Veterans Affirmative Action Program - Federal Personnel Manual Letter 720-7. Washington: G.P.O. 1983. 9 pages.

The President's Committee on the Employment of the Handicapped. Affirmative Action to Employ Disabled Veterans and Veterans of the Vietnam Era. Washington: G.P.O. 1980. 18 pages.

Tennessee Valley Authority. Administrative Release System - General Releases Volume 1. Knoxville: TVA, 1986.

U.S. Department of Labor. Federal Contractor Job Listing. Washington: G.P.O., no date given. 12 pages.

Veterans Administration. Federal Benefits for Veterans and Dependants. Washington: G.P.O., 1984. 72 pages.

Vocational Rehabilitation: Your Key to An Independent Future. Washington: G.P.O., 1983. 7 pages.

SUGGESTED READING LIST

Frank Bowe, Handicapping America: Barriers to Disabled People, 1978. Harper and Rowe.

Robert L. Burgdorf, Jr., The Legal Rights of Handicapped Persons, 1980. Paul H. Brooks, Publishers, Baltimore.

Gopal C. Patti and John I. Adkins, Jr., Managing and Employing the Handicapped: The Untapped Potential, 1981. Bruce-Park: The Human Resources Press.

U.S. Office of Personnel Management. Handbook On Reasonable Accommodations, 1982. Personnel Management Services.

The White House Conference on Handicapped Individuals, Steps: Handicapped Workers and Today's Labor Market, 1977. The Report of the Industry-Labor Council of the House Conference on Handicapped Individuals.

EMPLOYEE STATUS AND INFORMATION RECORD

NAME: GEORGE NOBLE

HOME PHONE: 205-837-3328
DATE OF BIRTH YR-MO-DAY: 27-05-22

PAYROLL/GR. NO.: 441570 HIGHEST GRADE: 09

CURRENT HOME ADDRESS: 116 ELAINE DRIVE

CITY: MADISON STATE: AL ZIP CODE: 35758

SEX: M MAR STATUS: M CITIZENSHIP: USA

SOCIAL SECURITY NO.: 417309372

SYS. CODE: 7 VETERANS PREF.: UN UNION CODE: 712

B. ORGANIZATION, SALARY

TITLE: CEMENT MASON CODE: 4800

SCHED GRADE: TA

EFFECTIVE DATE SCHED AND GRADE (YR-MO-DAY):
84-01-30 PAY RATE: 11.290

???: CONST. BRANCH: BELLEFNT

SECTION: MASONRY

ORGANIZATION CODE: B320084600

BET SYS CODE: 07 FEGLI CODE: E
OFFICIAL STATION: BELLEFNT

POST OFFICE OF OFFICIAL STATION (CITY-STATE-CODE):
HOLLYWOOD-AL-01305

SERVICE DATES

FEDERAL (YR-MO-DAY): 72-07-01

?? OR REEMP (??YR-MO-DAY): ?8-09-22

OTHER ITEMS

BADGE NO: 14015

ACCESSIONS AND SEPARATIONS

TERMINATION EFFECTIVE (YR-MO-DAY): 85-08-30

LAST DAY OF WORK (YR-MO-DAY): 85-07-31

REMARKS

REDUCTION IN FORCE.

SUMMARY OF ACTION

ACTION CODE: 4231 TYPE ACTION: RIF

EFFECTIVE DATE OF THIS ACTION (YR-MO-DAY) 85-08-30

DATE OF ISSUE: 85-09-05

TVA JOB HISTORY

DATE OF ACTION: 10/7/85 Mr. Noble came by employment office to state he was ready to return to work and wanted consideration due to his veteran's status RM

EMERGENCY CONTACT

FIRST, MIDDLE, LAST: LUCILLE C NOBLE

RELATIONSHIP: WIFE PHONE: 205-837-3328

ADDRESS: 116 ELAINE DRIVE

CITY: MADISON STATE: AL

SIGNATURES FOR APPROVAL AND CERTIFICATION:
/s/ C.J. Giddley

Tab No. 4b

PERSONNEL ACTION—HOURLY TL

Pers. Action Code: 4231

Date of Issue Year-Month-Day: 85/07/31 Badge Number: 14-015

Name (First, middle, last): George Noble

Official Station: Bellefonte MP

Post Office for Official Station: Hollywood, AL

Payroll Number: 441570

???: Cement Mason

Pay Rate: $11.29

Division and Branch: Construction - Bellefonte Nuclear Plant

TERMINATION

Last Day of Work (Year-Mo.-Day-Hour): 85/07/31

Effective Date (Year-Month-Day): 85/08/30

Red. in Force (More than One Year)

Reason for Status Change or Termination;
Cite Records That Explain:

Reduction in Force: Effective date is given in reduction in force notice dated July 29, 1985. See retention register dated June 2, 1983.

SUPERVISOR'S EVALUATION OF SERVICE:
(S1)=Satis. but above Av. (S2)=Satis. and average

MAJOR DUTIES PERFORMED:

Finishing slabs and related wet work (S2)

General repair (S2)

Grouting and dry packing bangers, anchors and base plates (S2)

Preparation and application of primary cost of protective coating (S2)

Comments—Additional Elements of Service:

Safety Observance: (S1)

Attendance & Promptness: (S2)

Personnel Officer Remarks: I certify this to be a true copy of the original document /s/ Ray L. Carpenter

Warehouse Clearance: /s/ James ??????

(Ext Medical Examination Execute unless form 1444 is used) Date: ??/07/??

Signature of Physician: /s/ can't read name???

Immediate Supervisor: /s/ can't read name???

Personnel Officer: /s/ can't read name???

OFFICE OF CONSTRUCTION
POSITION PAPER
RE:

GEORGE NOBLE

INTRODUCTION

On July 29, 1986, George Noble, Cement Mason, received a reduction-in-force notice informing him his last day of work would be July 31, 1985 and his effective date of termination would be August 30, 1985. On the TVA form 77 issued on July 31, 1985 to initiate Mr. Noble's termination, his work performance, attendance and promptness, and safety observance were all evaluated satisfactory.

On October 2, 1985, James L. Gifford, white male, age 34, was reemployed at the Bellefonte Nuclear Plant. Mr. Gifford's previous employment at Bellefonte had been terminated due to reduction in force. On July 19, 1985, Mr. Gifford received a reduction-in-force notice informing him that his last day of work would be July 24, 1985 and his employment would be terminated on August 23, 1985. On the TVA form 77 issued on July 24, 1985 to initiate the termination of Mr. Gifford's employment, two areas of his work performance were evaluated satisfactory but above average, and one area was evaluated satisfactory. Mr. Gifford received satisfactory evaluations on his safety observance and attendance and promptness.

On October 8, 1985, James Kincherlow, black male, age 49, was reemployed at Bellefonte Nuclear Plant. Mr. Kincherlow's previous employment at Bellefonte Nuclear Plant had been terminated due to reduction in force. On July 29, 1985, Mr. Kircherlow received a reduction-in-force notice informing him that his last day of work would be July 31, 1985 and his effective date of termination would be August 30, 1985. On the TVA form 77 issued on July 31, 1985 to initiate Mr. Kincherlow's termination, his work performance, safety observance, and attendance and

promptness were all evaluated satisfactory but above average.

On February 9, 1986, Mr. Noble filed an Equal Opportunity complaint of discrimination because of race and age.

ARMY OF THE UNITED STATES

HONORABLE DISCHARGE

This is to certify that

GEORGE NOBLE
14 199 210 Private 318th Army Air Forces BU
Army of the United States

is hereby Honorably Discharged from the military service of the United States of America.

This certificate is awarded as a testimonial of Honest and Faithful Service to the country.

Given at Spartian Point, Lockbourne
Columbus 17, Ohio

Date 2 January 1947

/s/ Nelson S Brooks
NELSON S BROOKS Lt Col., Air Coprs
COMMANDING

Recorded in
Vol. 15 Page 335
27 Feb 1948
Thos. W. Jones
J.P.C.

TENNESSEE VALLEY AUTHORITY
KNOXVILLE, TENNESSEE 37902
2W 170A Grand Union Building

August 4, 1988

Mr. George Noble
116 Elaine Drive
Madison, Alabama 35758

Dear Mr. Noble:

Thank you for your July 25 letter regarding your employment at TVA.

As John Giffin, Veterans Affairs Counselor, discussed with you, TVA uses the "call-by-name" system in filling some trades and labor vacancies. With this procedure TVA management has the right to call by name outside candidates to fill hourly trades and labor positions. A nonveteran cannot be "called by name" for a position if there is a qualified veteran who has currently claimed veteran preference with TVA and is available for employment. (See p.7 in Handbook for Veterans of Tennessee Valley Authority.)

If you are interested in reemployment at TVA, it is necessary that you have an updated application on file. Applications must be updated annually. A preference eligible veteran must claim preference with the appropriate TVA employment office each time he is laid off in order to be given such preference.

Enclosed is a Handbook for Veterans of Tennessee Valley Authority which contains information on TVA employment policy and procedures.

If I may be of further assistance, please contact me.

Sincerely,

/s/ John R. McQueeney
John R. McQueeney
Manager of Veterans Affairs

Enclosure

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1464

In the Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE NOBLE, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902-1499

JAMES E. FOX
Deputy General Counsel

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

HARRIET A. COOPER
Senior Litigation Attorney

RONALD E. KLIPSCH
Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902-1499

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Merit Systems Protection Board had jurisdiction to consider petitioner's claim that the Tennessee Valley Authority failed to honor his veterans' reemployment preference.

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TABLE OF AUTHORITIES

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Elder v. *Brannan*, 341 U.S. 277 (1951)	6
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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1464

GEORGE NOBLE, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-14a) is reported at 892 F.2d 1013. The opinion of the panel of the court of appeals (Pet. App. 16a-23a) is reported at 876 F.2d 1580. The decision and order of the Merit Systems Protection Board (Pet. App. 27a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered December 20, 1989. The petition for a writ of certiorari was filed March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked as a cement mason for the Tennessee Valley Authority (TVA) from 1972 to 1985.[1] His hourly position at the Bellefonte Nuclear Plant was, like all TVA positions, part of the "excepted service"—that is, he was appointed without having to take any of the civil service examinations that govern appointments to "competitive service" jobs.[2] Petitioner's position was terminated July 31, 1985, due to a reduction in force (RIF). Gov't C.A. Br. Add. 30. Nineteen of the 21 cement masons in petitioner's competitive level lost their jobs with TVA due to the RIF. Pet. App. 29a.

TVA generally used a "call-by-name" system to fill vacancies for hourly positions. Under that system, management would request the personnel office to hire specific candidates based on their qualifications. TVA's personnel office would then check its records to determine if former employees with reemployment rights or candidates with veterans' preferences should be hired before the individual selected by management. Under TVA's employment policy, TVA would not recognize a veterans' preference when filling vacancies unless a veteran notified TVA's personnel office that he intended to exercise his preference. Gov't C.A. Br. Add. 39. Once the personnel office determined who should be appointed, it would contact the appropriate union to request that the chosen candidate report to work. *Id.* at 42.

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[1] TVA is a government corporation, see 16 U.S.C. 831, 831r, and therefore is considered an executive agency for purposes of the civil service laws, 5 U.S.C. 105.

[2] The Federal Circuit has held that TVA employees are exempted from the competitive service by 16 U.S.C. 831b. See *Dodd* v. *TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985).

Petitioner was a "preference eligible" veteran at the time of the RIF, see 5 U.S.C. 2108(3), but did not fill out the forms necessary to exercise his preference until October 7, 1985 (Gov't C.A. Br. Add. 42). Consequently, the Bellefonte personnel office approved management's selection of a nonpreference eligible candidate for a cement mason position and hired him on October 2, 1985. *Id.* at 41, 46. On October 3, management requested that a second nonpreference eligible candidate be hired to fill a cement mason position. *Id.* at 34, 41, 47. The personnel office contacted the appropriate union on or about October 5, and the selected candidate received an official appointment on October 8. *Id.* at 34-35, 48. Because the candidate for the second cement mason position had already been contacted when petitioner exercised his veterans' preference on October 7, petitioner was not given a preference for that job. *Id.* at 42. Petitioner's preference was recognized, however, when subsequent jobs became available, and petitioner worked at Bellefonte on four different occasions between October 1985 and May 1988. Pet. App. 30a-31a.

2. In February 1986, petitioner filed an Equal Employment Opportunity complaint with TVA claiming that he had been discriminated against on the basis of race and age when he was separated by the RIF on July 31, 1985, and when TVA failed to rehire him in October 1985. On February 10, 1988, after a hearing before an EEOC examiner, TVA entered a final decision rejecting petitioner's claims. Gov't C.A. Br. Add. 9-18.

Petitioner sought review of TVA's decision before the Merit Systems Protection Board (MSPB). Petitioner also alleged, for the first time, that TVA's failure to rehire him in October 1985 violated his rights under the Veterans' Preference Act of 1944 (VPA), ch. 287, 58 Stat. 387 (codified as amended at 5 U.S.C. 1302, 2108, 3305(b),

3308-3318, 3320, 3363, 3501-3504, 7511-7514, 7701). Without specifically addressing its jurisdiction over petitioner's VPA challenge, the MSPB held that it did not have jurisdiction to consider any reemployment claims by excepted service members. Gov't C.A. Br. Add. 56. Accordingly, the MSPB limited its review to the *bona fides* of the RIF. Pet. App. 28a. Based on the evidence presented at a hearing, the MSPB rejected petitioner's contention that the RIF was discriminatory or otherwise invalid, holding that TVA decided to reduce its work force solely because of the lack of work at the Bellefonte plant. *Id.* at 32a.

3. On appeal to the United States Court of Appeals for the Federal Circuit, petitioner waived all claims except his contention that TVA violated his rights under the VPA when it rehired two nonveterans in early October 1985. Pet. App. 2a. A unanimous panel of the court held that petitioner had stated a claim under the VPA and that the MSPB had jurisdiction to consider that claim. Because the MSPB had not addressed the merits of petitioner's challenge to TVA's hiring of the two non veterans, the court remanded the case to the MSPB for further proceedings. Pet. App. 22a.

The court of appeals then granted TVA's petition for rehearing en banc, and on rehearing, concluded that the MSPB did not have subject matter jurisdiction to consider petitioner's VPA claim. While acknowledging that TVA is required to honor the reemployment rights of preference eligible veterans, the court explained that petitioner could only take a claim for enforcement of those rights to the MSPB if jurisdiction to hear such a claim had been "granted to [the MSPB] by 'law, rule, or regulation.' " Pet. App. 3a (quoting 5 U.S.C. 7701(a)). Since the court found no such law, rule, or regulation, the appeal was dismissed.

Judge Bennett, joined by Judges Friedman and Newman, dissented. Judge Bennett argued that Congress

intended to provide administrative and judicial review of an agency's failure to reemploy a preference eligible veteran of petitioner's status. Although Judge Bennett could not point to any statute or regulation that directly authorized MSPB review of such actions, he asserted that "Congress is presumed to have intended judicial review of agency actions unless there is persuasive reason to believe otherwise." Pet. App. 13a. "[I]n the present case," Judge Bennett argued, "there is no implicit or overt manifestation of congressional opposition to review." *Ibid.*

ARGUMENT

Petitioner renews his contention that the MSPB had jurisdiction to address his claim that TVA violated his veterans' preference by failing to hire him when positions for which he was qualified became available in October 1985. The jurisdiction of the MSPB is set forth in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which provides, in pertinent part, that "[a]n employee * * * may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a). The court of appeals properly determined that there is no "law, rule, or regulation" entitling petitioner to bring his claim to the MSPB. Consequently, no question is presented that warrants this Court's review.

1. Petitioner is a preference eligible veteran under the VPA. 5 U.S.C. 2108(3). Following the RIF, he was entitled to be considered for reemployment before nonpreference eligible candidates once he notified TVA that he intended to exercise his veterans' preference. 5 U.S.C. 3315, 3316, 3320; Gov't C.A. Br. Add. 39, 42. However, no law, rule, or regulation authorizes a preference eligible member of the excepted service, such as petitioner, to seek MSPB

review of his claim that an agency has not honored his reemployment priority rights. Consequently, the MSPB did not have jurisdiction to consider petitioner's claim. 5 U.S.C. 7701(a).[3]

In addition to his reliance on Section 7701(a), petitioner contends (Pet. 5) that his claim may be heard by the MSPB pursuant to 5 C.F.R. 351.901, which provides that "[a]n employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal to the Merit Systems Protection Board." Apparently, petitioner believes that this regulation gives an employee adversely affected by a RIF the right to challenge an agency's failure to rehire him. That reading of Section 351.901 is wide of the mark. Part 351 of Title 5 of the Code of Federal Regulations authorizes agencies to reduce the size of their work force when there is a "surplus of employees," 5 C.F.R. 351.201(a), and deals only with the order in which competing employees shall be *retained.* The employment retention rights set forth in those regulations are entirely separate and distinct from the *reemployment* right claimed by petitioner.[4] Indeed, the distinction between retention and reemployment rights has been recognized in statutes, compare 5 U.S.C. 3501-3504 with 5 U.S.C. 3315, 3581-3584, 3597; in regulations, compare 5 C.F.R. Pt. 351 with 5 C.F.R. Pt. 352; and in a decision of this Court, see *Elder* v. *Brannan,* 341 U.S. 277, 286-289 (1951) (holding that reemployment rights under the VPA are not measured by referring to "retention-preference" regulations). Thus, as the court of appeals correctly held

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[3] See *Lackhouse* v. *MSPB,* 773 F.2d 313, 315 (Fed. Cir. 1985), cert. denied, 475 U.S. 1049 (1986); *Rose* v. *Department of Health and Human Servs.,* 721 F.2d 355, 356 (Fed. Cir. 1983).

[4] For the same reason, 5 C.F.R. 351.202(a)(1), also relied on by petitioner (Pet. 5), is of no help to him.

(Pet. App. 4a n.1), 5 C.F.R. 351.901 provides the basis for an appeal to the MSPB only for claims that an agency violated an employee's retention priority rights. It does not provide "an avenue by which [petitioner] may appeal to the MSPB based on an alleged violation of his VPA reemployment rights." Pet. App. 4a n.1.

Other regulations establish the legal basis for an appeal to the MSPB to vindicate reemployment rights, but none of those provisions applies to a person in petitioner's position. Section 330.209 of Title 5 of the Code of Federal Regulations provides that "[a]n individual who believes that his or her reemployment priority rights under this subpart have been violated * * * may appeal to the [MSPB]." But Pt. 330 applies only to members of the competitive service, not to members of the excepted service such as petitioner.[5] 5 C.F.R. 210.101(b), 330.203(a)(1). Likewise, the appeal rights set forth in Pts. 302, 352, and 353 do not apply to members of the excepted service who claim a violation of a veterans' preference following a separation by RIF from TVA. See, *e.g.*, 5 C.F.R. 302.103 and 302.501 (employees who have suffered a compensable injury); 5 C.F.R. 352.209 (employees who have been transferred to another executive agency); 5 C.F.R. 352.508 (employees who have served under the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424); 5 C.F.R. 353.401 (employees separated or placed on a leave of absence because of military duty). See also 5 C.F.R. 1201.3 (setting forth the jurisdiction of the MSPB).

2. Petitioner also contends (Pet. 5-8) that the MSPB has jurisdiction to hear his claim because, without such

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[5] The fact that the VPA applies to members of the excepted service, such as TVA employees, does not affect those laws and regulations governing the jurisdiction of the MSPB that recognize a distinction between the excepted and competitive services.

review, veterans like petitioner would be unable to enforce the priority employment rights expressly granted to them by Congress. Such a result, petitioner argues, would be contrary to the purpose of the VPA.

Petitioner's argument is undercut by 5 U.S.C. 7701(a), in which Congress specifically limited the MSPB's jurisdiction to actions appealable to the MSPB "under any law, rule, or regulation." Congress did not enact any laws authorizing an appeal to the MSPB of an agency's failure, when rehiring, to honor veterans' employment preferences. Instead, Congress instructed the Office of Personnel Management (OPM) to promulgate regulations "that implement the Congressional policy that preference shall be given to preference eligibles * * * in appointment, reinstatement, reemployment, and retention * * *." 5 U.S.C. 1302(b). Given this broad mandate, OPM clearly had discretion to determine which agency personnel actions should be subject to MSPB review and which should not. OPM exercised that discretion by granting only former members of the competitive service the right to bring to the MSPB a claim challenging an agency's failure to honor reemployment priority rights. 5 C.F.R. 330.202. Although OPM's decision limits the ability of preference eligible members of the excepted service to enforce their reemployment rights, OPM's policy choice cannot be considered contrary to the intent of Congress in light of 5 U.S.C. 7701(a), which delegates to OPM extensive authority to define the MSPB's jurisdiction.

Nor does *United States* v. *Fausto*, 484 U.S. 439 (1988), cited by both petitioner (Pet. 8) and the dissent below (Pet. App. 12a-14a), support the argument that petitioner must be provided a forum to enforce the rights granted to him by the VPA. To the contrary, in *Fausto* the Court rejected a claim by a member of the excepted service that he was entitled to judicial review of an agency's "adverse action"

(see 5 U.S.C. 7512) for which the CSRA did not provide a remedy. The Court held that Congress's failure explicitly to provide employees in the excepted service a right to appeal adverse actions to the MSPB "is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action * * *." 484 U.S. at 448-449. *Fausto,* therefore, supports the court of appeals' resolution of the instant case. Congress's failure to provide, or to instruct OPM to provide, MSPB review of an agency's alleged violation of an excepted service member's reemployment priority rights indicates a congressional judgment to deny such an employee a statutory right to MSPB review.[6]

3. Even if the MSPB had jurisdiction to hear petitioner's claim, the facts of this case make clear that petitioner would not be entitled to relief. Petitioner contends that because he was a preference eligible veteran, he should have been employed ahead of the two nonveterans hired by TVA to fill the cement mason positions that became available after the RIF. But the record shows that both of the nonveterans had been offered positions with TVA by the time petitioner officially notified TVA that he intended to exercise his veterans' preference. Under TVA's personnel policy, such notification is necessary before TVA will honor a veterans' preference. See Gov't C.A. Br. Add. 39, 42. That notification policy is clearly consistent with the VPA, which provides that a veteran is entitled to

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[6] Petitioner was not entirely without a remedy for his alleged injury. Under the applicable TVA collective bargaining agreement, he could have filed a grievance complaining that TVA failed to honor his veterans' preference.

be placed on reemployment lists "on request." 5 U.S.C. 3315. Similarly, the regulations governing such lists in the competitive service require the veteran to complete a detailed application, 5 C.F.R. 330.202(a), and provide that an agency need not place a veteran on the reemployment list until "ten calendar days after receipt of an application or request." 5 C.F.R. 330.202(b). Thus, TVA's decisions to appoint one nonveteran before petitioner asked to exercise his preference and to appoint a second nonveteran only one day after his request did not violate the VPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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